13293

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 96.

THE DIAMOND MATCH COMPANY, APPELLANT,

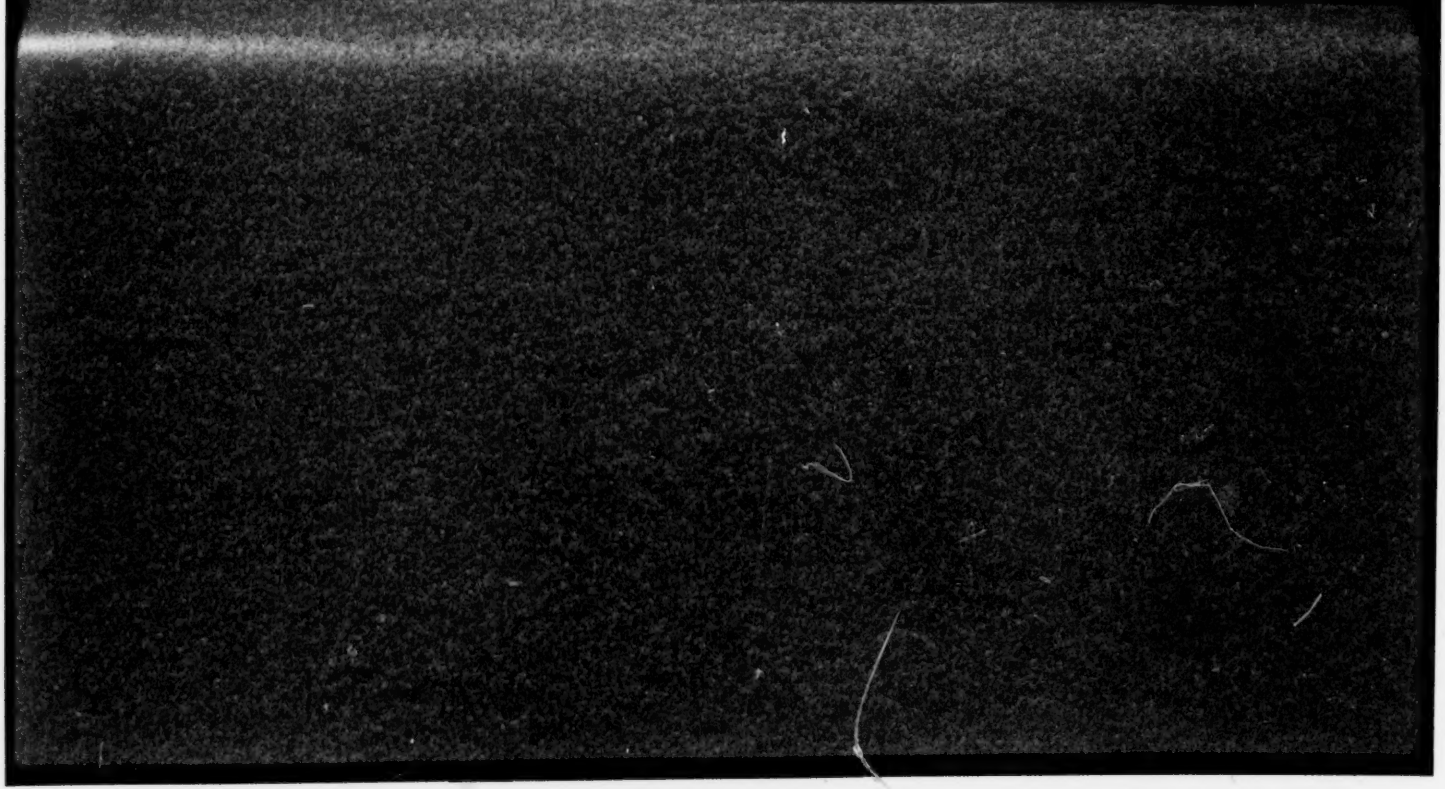
vs.

THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED MAY 31, 1902.

(16,153.)



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THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE.

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* * * * * * * *

1 Be it remembered that on the day, to wit, the twenty-fifth day of August, A. D. 1899, came the complainant in said entitled cause, by its attorney, and filed in the clerk's office of said court a certain bill of complaint in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA, ss:

United States Circuit Court, Western District of Michigan.

THE DIAMOND MATCH CO., a Corporation,
vs.
THE VILLAGE OF ONTONAGON, a Municipal Corporation; George Ducleau, Treasurer of the Village of Ontonagon; The Township of McMillan, a Quasi-public Corporation, and The Township of Ontonagon, a Quasi-public Corporation. } In Chancery.

To the honorable the judges of said court, in chancery sitting:

The complainant, The Diamond Match Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of said State, files this its bill against the Village of Ontonagon, a municipal corporation, in the county of Ontonagon and State of Michigan, and a citizen of said State, George Ducleau, treasurer of the village of Ontonagon, and a citizen of the State of Michigan, the Township of McMillan, a quasi-public corporation of the county of Ontonagon, State of Michigan, and the Township of Ontonagon, a quasi-public corporation of the county of Ontonagon and State of Michigan, and respectfully represents and shows to the court:

First. That the complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois,
3 with its principal office and place of business in the city of Chicago in said State; that it is engaged in the manufacture and sale of matches; that in the prosecution of its said business it uses a large amount of pine wood, lumber, timber, etc., and that it supplies itself with the same from its own and other timber lands situated in the State of Michigan, in the county of Ontonagon, and adjoining counties thereto; that it has been its custom to procure its said timber for its said purposes as follows: It cuts the same upon its said lands above mentioned in the winter season; the logs thereof are during said season placed upon and in the Ontonagon river and tributaries thereto which traverse aforesaid lands, and said logs there remain until the thawing and breaking up of the ice in said rivers in spring time, when they are driven down said streams to the booms, pier jams and sorting grounds of this complainant at or near the mouth of the Ontonagon river

Second. That in the summer and fall of the year 1895 extensive forest fires swept through the aforesaid Ontonagon and adjoining

counties and covering the timber tracts of the complainant company, and doing great damage to the timber thereon; that in order to preserve the timber so injured by said fire it was necessary to cut all said timber and put the same into the waters of the above-named streams; that during the winters of 1895 and 1896 complainant cut, hauled and put into the Ontonagon river and its tributaries a large number, to wit, one hundred and eighty million feet (180,000,000) of logs for the purpose of saving, protecting and preserving the same; that one hundred and eighty million feet of logs is a much greater number than the complainant ever utilized or could utilize in any one season in its business; that at the time the same were put into the waters aforesaid, it was not the intention of the complainant at the opening of said streams in the following spring to make a clean drive of the same, but to take down said streams the following spring and summer, and each succeeding driving
4 season thereafter, only a sufficient number thereof as the complainant could utilize at its mills; that at the time the logs were so cut and put into the streams aforesaid complainant was the owner of lumbering mills situated at or near the mouth of the Ontonagon river, and in or near to the corporate limits of the village of Ontonagon situated on said river; that it was at that time the intention of the complainant to saw the said logs aforesaid at its above-named lumbering mills; that said mills of complainant at Ontonagon were destroyed by fire in the fall of 1896; that the complainant never rebuilt the same, but that after the destruction thereof it destined the logs above described for its mills situated at Green Bay, Wisconsin; that while said mills at Green Bay *was* the destination of said logs, that, as above set forth, it was not the intention of said complainants to take to said mills during any one summer season any more than sufficient for its purposes, and not to exceed generally twenty million feet annually; that the route covered by said logs from their position in said streams to said mills at Green Bay is as follows: They are driven down the tributaries of said Ontonagon river into the stream of said river and thence down said Ontonagon river to a point at or near the mouth thereof in the township of Ontonagon to the sorting grounds and pier jams of the complainant; they are then loaded aboard cars and shipped by rail to Green Bay, Wisconsin, via the Chicago, Milwaukee & St. Paul railway, and pass out of the State of Michigan at a point near the village of Iron Mountain in said State.

Third. That when the driving season for the summer of 1898 had ended and the aforesaid Ontonagon river and tributaries thereto were closed by ice a large number of the aforesaid logs of complainant remained in and along said streams, to wit, thirty million feet of said logs; that said logs last above named were ice-bound in the said Ontonagon river and its tributaries the whole of the winter
5 season of 1898 and 1899 up to and until the first day of May, 1899, and were during said time, and on the first day of May, 1899, in said streams and within the confines of the defendant, The Township of McMillan, a quasi-public corporation, comprising a portion of the county of Ontonagon, which said township is trav-

ersed by the said Ontonagon river and tributaries thereto; that on the breaking up of the ice in the said Ontonagon river and its tributaries on or about the middle of May, 1899, complainant began driving a portion of said logs down said streams, and from then until about June 15th, continued so to do until it had taken down said stream and into its booms, pier jams or sorting grounds at or near the mouth of said Ontonagon river, and without the village of Ontonagon, in the township of Ontonagon, a large number of said logs, to wit, ten million feet, the greater portion of which still remain there; that none of said logs were ever within the corporate limits of the defendant, The Village of Ontonagon, until and after the 15th day of June, A. D. 1899, and that not to exceed four hundred thousand feet (400,000) at any one time since that date have been within the corporate limits of said defendant, The Village of Ontonagon, and then only for the purpose of loading the same on cars for shipment to Green Bay, Wisconsin.

Fourth. That there are special laws in force in the State of Michigan relative to the taxation of forest products, and in relation to the taxation of logs in transit; that paragraph 3837, section 14, vol. 1 of the Compiled Laws of Michigan, 1897, was, by an act of the legislature of said State passed and in force on and after Saturday the 8th day of April, A. D. 1899, and relating to the taxation of logs in transit, amended to read as follows:

"Personal property of non-residents of the State, and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises,
store, mill, dock, yard, piling ground, place of storage
6 or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within the State it shall be assessed in such place, except that where such property is in transit to some place without the State it shall be assessed at the place in this State nearest to the last boom or sorting gap of the stream in or bordering on this State in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any water-course in or bordering on this State, then such assessment shall be made at the point where such property will naturally leave the State in the ordinary course of its transit, and such property so in transit to any place without the State shall be assessed to the owner or person, persons or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons, or corporation operating upon any such stream, then such property may be assessed to such person, persons, or corporation, and the person, persons, or corporation so assessed for any such property belonging to a non-resident of this State shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment, or for money had and received any amount which the person, persons, or corporation so assessed is compelled

to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied: Provided, further, that any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons, or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200) with two sufficient securities, conditioned for the payment of such tax by such owner or person interested, and the saving of the person, persons or corporation assessed from payment thereof, and from costs, damages and expense on account of his nonpayment which bond as to amount and sufficiency of surety shall be approved by the county clerk of the county in which the assessment is made."

Fifth. That the general law for the incorporation of villages in the State of Michigan under and by virtue of which the said village of Ontonagon is incorporated authorizes said village of Ontonagon to levy and collect taxes in accordance with the provisions herein set out:

Villages; finance and taxation.—Compiled laws of Michigan.

Vol. 1 (2852). SEC. 1. "The council shall have authority to raise, by general tax upon the real and personal property liable to taxation in said village (exclusive of taxes for highway and street
7 purposes and not otherwise provided for in this act), such sum not exceeding in any one year one and one-fourth of one per cent. of the assessed value of such property, as they shall deem necessary for the purpose of defraying the general expenses and liabilities of the corporation, and to carry into effect the powers in this act granted. The moneys so raised shall constitute a 'general fund.'"

(2853.) SEC. 2. "The council shall also have power to raise, by general tax upon all real estate and personal property aforesaid, such sum not exceeding one-half of one per cent. of the assessed value of said property, as they shall deem necessary for highway and street purposes. Such moneys shall constitute 'a general highway fund,' and shall be expended exclusively for working and improving the highways, streets, lanes and alleys of the village and for the construction and repairs of bridges therein."

(2857.) SEC. 6. "The council may also raise annually such further sum, not exceeding five mills on the dollar of the assessed value of the property in the village, as may be needed for an interest and sinking fund to pay the funded debt of the village, if any, and the interest thereon. The money so raised shall be used for the purpose aforesaid and for no other."

Sixth. That in and by virtue of the law relating to incorporated villages in the State of Michigan, it is provided, among other things, that the assessor of every village shall in each year, and at and within the same time as required by the general laws of the State

for the assessment of property in the townships of the State, make an assessment-roll containing a description of all the real property and the aggregate amount of all the personal property subject to taxation in the village; that in accordance with said provision, and in accordance with the laws heretofore set out and in force in the State of Michigan, and in accordance with other laws in the State of Michigan, it is the duty of the assessors of the various townships and villages of the said State of Michigan to prepare their assessment-rolls of the property within their respective territories and to return the same to the proper officials at and within the same period of time, and that if said assessors aforesaid properly perform their aforesaid duties, it would be impossible, in the absence of fraud or mistake, for the different assessors to place upon their assess-
8 ment-rolls for one and the same season the same property.

Seventh. That the defendant herein, The Township of McMillan, acting through and by its proper officials, claimed, under and by virtue of the laws heretofore set out and referred to, to have the right to assess and tax all of complainant's logs aforesaid, and did assess all of said complainant's logs for the purpose of levying a tax thereon for the year 1899; that the said logs were assessed by the proper assessing officer of said township of McMillan in accordance with the laws provided for that purpose and for the purpose of levying a tax thereon for the year 1899, and this complainant appears upon the assessment-roll of said officer as the owner of said logs, and as such owner liable to be taxed thereon in said township of McMillan for the year aforesaid; that the assessed valuation of the same by the said assessing officer of the town of McMillan is ten thousand dollars ($10,000), as appears by the assessment-roll of said township; that the amount of taxes levied, or to be levied, on said valuation and which the said township of McMillan claims the right to levy, and will levy, if not prohibited by court, by reason of its assessment on said logs, and by reason of the assessment of said logs as now appears upon its assessment-roll, will amount, so this complainant is informed and believes and upon such information and belief charges the fact to be, to a large sum, to wit, the sum of one thousand dollars ($1,000.00).

Eighth. That the defendant herein, The Township of Ontonagon, acting through and by its proper officials, claimed, under and by virtue of the laws heretofore set out and referred to, to have the right to assess and tax all of complainant's logs aforesaid, and did assess all of said complainant's logs for the purpose of levying a tax thereon for the year 1899; that the said logs were assessed by the proper assessing officer of said township of Ontonagon in accordance with the laws provided for that purpose and for the purpose
9 of levying a tax thereon for the year 1899, and this complainant appears upon the assessment-roll of said officer as the owner of said logs, and as such owner liable to be taxed thereon in said township of Ontonagon for the year aforesaid; that the assessed valuation of the same by the said assessing officer of the town of Ontonagon is one hundred thousand dollars ($100,000), as appears by the assessment-roll of said township; that the amount of taxes

levied, or to be levied, on said valuation and which the said township of Ontonagon claims the right to levy, and will levy, if not prohibited by court, by reason of its assessment on said logs, and by reason of the assessment of said logs as now appears upon its assessment-roll, will amount, so this complainant is informed and believes and upon such information and belief charges the fact to be, to a large sum, to wit, the sum of three thousand dollars ($3,000.00).

Ninth. That notwithstanding that none of complainant's logs aforesaid were, or ever came within the corporate limits of the village of Ontonagon until after the first day of June, 1899, nor until after the proper time for the completion of the assessment of the property within said village by the assessor thereof for the purpose of levying taxes thereon, as provided by law, was passed, yet the defendant, The Village of Ontonagon claimed, under and by virtue of the laws heretofore set out and other laws of the State of Michigan in force and referred to, the right to assess all complainant's said logs for the purpose of levying a tax thereon for municipal purposes for the year 1899, and that said defendant The Village of Ontonagon, through and by its assessor, did assess all said complainant's logs for the purpose of levying a tax thereon, and that said complainant appears upon the assessment-roll of said village as the owner of the aforesaid logs and subject to be taxed therefor, for the purposes of said village of Ontonagon; that the assessed valuation placed upon said logs by the
10 assessor of said village of Ontonagon, as shown by the assessment-roll thereof for said village, is one hundred thousand dollars; that said valuation so placed upon complainant's aforesaid logs by said assessor was allowed to remain unchanged by the board of review of said village, whose duty, as is provided by law, is to pass upon and review the acts of the assessor of said village; that said assessor of said village of Ontonagon, in accordance with the provisions of the law, properly returned his assessment-roll for the purposes of review to the board of review of said village, which, after passing upon the same, properly certified the same to the council of said village, which afterwards returned the same to the assessor of said village, together with the amount of taxes to be raised, which amount of said taxes to be raised was then by the assessor divided *pro rata* and set opposite to the property appearing in said assessment-roll; that said village of Ontonagon has levied thereby upon said complainant's logs, for municipal purposes, the sum of sixty-seven hundred and fifty dollars ($6,750.00) upon the assessed valuation of one hundred thousand dollars ($100,000) fixed by said assessor in said assessment-roll, which said sum of $6,750.00 is divided into three separate parts,—one for $1,250.00 being 1¼ per cent. tax on the assessed valuation of said logs for general purposes; second, for $500.00 being five mills on each dollar of the assessed valuation for highway purposes, and the third $5,000.00 being five per cent. on the assessed valuation for a sinking fund or bond purposes; that the assessment-roll of said village of Ontonagon, with the amount claimed as taxes to said village, by virtue of its levy thereon on the property therein designated set opposite the property, as provided by law, with a warrant to the treasurer of said

village to collect from the owners of the property therein described the amount so claimed to be due from the property of such owner, which said warrant is executed by the proper officers of said
11 village, all as is provided by law, is now in the hands of the defendant George Ducleau, treasurer of said village of Ontonagon; that said defendant George Ducleau, treasurer, has demanded of this complainant the aforesaid sum of $6,750.00 in payment of the taxes so levied against complainant on account of complainant's ownership of the aforesaid logs.

Tenth. That the assessment and taxation of complainant's logs aforesaid by the village of Ontonagon, heretofore set out, is illegal, fraudulent and void; that the village of Ontonagon through and by its assessor had no right to place complainant's logs aforesaid upon its assessment-roll for the purpose of levying taxes thereon for the year 1899, or for any other purpose; that the placing of said logs on said assessment-roll and the assessment thereof by said village of Ontonagon was done without the knowledge of this complainant; nor did the complainant learn thereof until after the time for it to secure relief, as provided by law, before the board of review for said village had passed; that said village of Ontonagon through and by its proper officials has no right to collect the tax levied upon said logs as heretofore described from this complainant; that said village of Ontonagon has no right to tax logs in transit for any purpose whatsoever; that said logs nor any portion of the same were within the corporate limits of the said village of Ontonagon at the time that they were placed upon the assessment-roll of the assessor thereof for the purpose of taxation for the year 1899, nor had they ever been prior to that time within the corporate limits of said village; nor have they ever been so as to render them liable to taxation by said village of Ontonagon; nor are they now in said village, except a portion thereof preparatory to being shipped therefrom; that the amount of taxes so levied against the complainant on account of its ownership of said logs by said village of Ontonagon is excessive and exorbitant, and greater than the amount allowed to be taxed
12 in any one year by said village upon any property of the value of said logs and rightfully within its limits.

Eleventh. That the defendants, The Village of Ontonagon and George Ducleau, treasurer of said village of Ontonagon, will, unless restrained by this court, and unless the complainant herein complies with their demand for the payment of the taxes aforesaid described, levied by said village upon complainant's aforesaid logs, levy upon said logs, or a portion thereof, or other property of this complainant found within the State of Michigan, for the purpose of selling the same to satisfy the claim of said village to the amount of the taxes so levied by said village against said logs; that said defendants last above named have threatened this complainant that unless the complainant pays said taxes so levied by said defendant The Village of Ontonagon that the defendant George Ducleau, treasurer of said village, will seize said logs, or a sufficient amount thereof, or other property of said complainant within the State of Michigan, for the purpose of selling the same and applying the proceeds

thereof to the satisfaction of the amount claimed due said village for the taxes aforesaid.

Twelfth. That by reason of the premises heretofore set out and that by reason of the law for the taxation of logs and forest products in the State of Michigan, which this complainant shows is indefinite and vague, this complainant is unable to determine in which of the townships herein made defendants, namely, The Township of McMillan and The Township of Ontonagon, complainant's said logs are herein properly taxable; that it does not seek to avoid or escape the payment of a just and reasonable tax upon its aforesaid logs; that it stands willing and ready to pay to whichever one of said townships, as this court determines, has a right to tax and assess said logs for the year 1899 whatever sum is just and reasonable and its proportionate share of said taxes of said township by reason of its ownership of said logs; that it has not colluded
13 with any of the defendants herein; that it is not now in collusion with any of the defendants herein; that it files this bill of its own accord and for the sole purpose of having its rights determined herein, and for its protection against triple taxation and to avoid a multiplicity of suits and vexatious litigation.

Thirteenth. That while this complainant stands ready and willing to pay its just and reasonable taxes to the State of Michigan in either the township of McMillan or the township of Ontonagon, as this court may determine, yet this complainant shows to the court that the valuation of its said logs by the assessing officer of the township of Ontonagon is excessive, exorbitant, and out of proportion to the valuation placed upon the other personal property by said assessor in said township; that the assessment of said logs by said assessor of said township of Ontonagon was unknown to this complainant prior to the time for it to secure relief before the proper board of review; that it was unknown to said complainant until just prior to the filing of this the complainant's bill herein; that the complainant is informed and believes, and upon such information and belief charges the fact to be, that the valuation placed upon complainant's logs by the assessor of said township of Ontonagon was made excessive and exorbitant and much higher relatively than other personal property was assessed by said assessing officer for the purpose of making this complainant bear an unfair portion of the burdens of taxation in said township, and to relieve the residents of said township from bearing their just proportion of the taxes of said township, and that should this court determine that complainant's logs aforesaid were for the year 1899 properly assessable and taxable in the township of Ontonagon aforesaid, that then this court should determine what is a just and fair assessed valuation upon said logs in said township for the purpose of taxation for the year aforesaid.

14 Fifteenth. That the amount in dispute herein exceeds the sum of two thousand dollars ($2,000.00), exclusive of interest & costs.

Forasmuch therefore as the complainant is without an adequate remedy in the premises except in a court of equity; to the end that

the said Village of Ontonagon, a municipal corporation, George Ducleau, treasurer of the village of Ontonagon The Township of McMillan, a quasi-public corporation, and The Township of Ontonagon, a quasi-public corporation, all of whom are made parties defendant herein, may be required to make full and direct answer to this bill, and its several allegations, but not under oath, the answer under oath being hereby waived; that the rights of the complainant and the defendants be ascertained; that the defendants The Township of McMillan and The Township of Ontonagon may be required to interplead herein; that it may be determined which one thereof had the right to assess the complainant's logs herein described for the purpose of levying taxes thereon for the year 1899, and which of the said defendants has the right to collect taxes because of its assessment of said logs for the purposes of taxation for the year aforesaid; that the assessed valuation of said logs in whichever township it is determined has the right to assess the same be fixed at an equitable and just amount, and in accordance with the valuation placed upon other property of like nature in said township; that the one of the two defendants last above named so found not to have had the right to so assess said logs be forever restrained from levying or collecting any tax by reason of its assessment thereof, and be perpetually restrained and enjoined from levying upon any of the property of this complainant situated in the State of Michigan to satisfy any tax so levied and assessed against this complainant by reason of its ownership of said logs, and from taking any steps whatsoever for the collection of any taxes from this complainant because of its wrongful taxation of complainant's logs; that the defendants
15 The Village of Ontonagon, and George Ducleau treasurer thereof, be forever enjoined and restrained from levying upon complainant's logs, or upon any other property of this complainant whatsoever situated in the village of Ontonagon or elsewhere in the State of Michigan, or from seizing said logs or any of complainant's property whatsoever, or from taking any steps or means whatsoever to collect from this complainant the sum of sixty-seven hundred and fifty dollars ($6,750.00), or any other sum, claimed by said village of Ontonagon to be due to it by reason of its assessment and taxation of complainant's logs for municipal purposes for the year 1899, and that the assessment of complainant's aforesaid logs by the village of Ontonagon and the levy of the aforesaid taxes against complainant's said logs by reason of said assessment be decreed to be illegal and void, and of no effect whatsoever; and that the complainant may have such other and further relief in the premises as equity may require and to your honors may seem just and meet.

May it please the court to grant unto the complainant the writ of summons in chancery directed to the marshal of the said district commanding him that he summons the said defendants The Village of Ontonagon, a municipal corporation, George Ducleau, treasurer of the village of Ontonagon, The Township of McMillan, a quasi-public corporation, and The Township of Ontonagon, a quasi-public corporation, to be and appear in this court at the next term thereof, to be holden in the room occupied by this court as a court-room in

the city of Marquette, Michigan, to answer the premises and abide by and perform such decree as may be entered herein:

May it please the court to grant unto the complainant the writ of injunction enjoining and restraining the Village of Ontonagon, George Ducleau, treasurer of the village of Ontonagon, their counselors, attorneys, *attorneys*, trustees, agents, clerks, employés,
16 servants and workmen, and each and every of them, from levying upon complainant's logs, or upon any other property of this complainant whatsoever situated in the village of Ontonagon or elsewhere in the State of Michigan, or from seizing said logs or any of complainant's property whatsoever, or from taking any steps or means whatsoever to collect from this complainant the sum of sixty-seven hundred and fifty dollars ($6,750.00), or any other sum, claimed by said village of Ontonagon to be due to it by reason of its assessment and taxation of complainant's logs for municipal purposes for the year 1899.

And the complainant will ever pray, etc.

THE DIAMOND MATCH COMPANY,
By WALKER & PAYNE, *Its Solicitors.*

WALKER & PAYNE,
Solicitors for Complainants.
EDWIN WALKER,
JOHN BARTON PAYNE,
Of Counsel.

17–41 STATE OF ILLINOIS, } ss:
Cook County, }

Ralph E. Wirt, being first duly sworn, on oath deposes and says that he is the assistant secretary of the Diamond Match Company, a corporation, and duly authorized to make this affidavit on its behalf to its foregoing bill; that he has heard read the said bill of complaint and that he knows the contents thereof and that the same is true, except as to the matters and things therein stated to be upon information and belief, and as to those matters he believes them to be true.

RALPH E. WIRT.

Subscribed and sworn to before me this 23rd day of August, A. D. 1899.

E. C. KERNOLFF,
[SEAL.] *Notary Public.*

(Endorsed:) No. 148. United States circuit court, western district of Michigan, northern division. The Diamond Match Company, *vs.* The Village of Ontonagon, *et al.* Bill for injunction. Filed Aug. 25 1899. Chas. L. Fitch, clerk. Walker & Payne, sol'rs for compl't.

* * * * * * *

42 And afterwards, to wit, on November 4th, A. D. 1899, came the defendants, The Village of Ontonagon, and George Du-

cleau, treasurer thereof, and filed in the office of the clerk of said court in the said entitled cause, their joint and several answer, which said answer is in words and figures as follows, to wit:

43 The Circuit Court of the United States for the Western District of Michigan, Northern Division.

The answer of the Village of Ontonagon and of George Ducleaux, its treasurer, to the bill of complaint filed against them by The Diamond Match Company, with other defendants, as follows: The Township of McMillan and The Township of Ontonagon.

Answering said bill of complaint, these defendants, The Village of Ontonagon and said George Ducleaux, its treasurer, say:

First. These defendants have no knowledge sufficient to form a belief whether the complainant is a corporation organized and existing under the laws of Illinois, or whether it has its principal office and place of business in the city of Chicago. They admit the other allegations of paragraph marked "First" in the bill of complaint.

Second. These defendants admit that the forest fires damaged timber owned by the complainant, but deny that the quantity so damaged equaled one hundred eighty million feet, and allege that the quantity so damaged did not exceed fifty million feet; they admit that the complainant put one hundred and eighty million feet of logs into the Ontonagon river and its tributaries, as in said bill alleged, but deny that it put into said river and its tributaries said quantity of timber for the reason in said bill stated; they admit that one hundred eighty million feet is a greater quantity than complainant ever utilized in any one season, and that at the time said one hundred and eighty million feet of logs were put into the stream, it was not the intention of the complainant to make a clean drive of the same the following spring, but what number in succeeding driving seasons the complainant intended to drive, defendants say they have no knowledge sufficient to form a belief. They admit that at the time aforesaid, complainant owned lumber mills in the village of Ontonagon, and they allege that said
44 mills were all within the village of Ontonagon, and they admit that it was the intention of the complainant to saw all of said logs in said mills, and admit that the same were destroyed by fire, as alleged, in 1896, and that complainant never replaced the same. They admit that after the destruction of said mills said logs were destined to be cut in mills at Green Bay, Wisconsin, but they have no knowledge sufficient to form a belief as to what was the intention of complainant in respect to the quantity of logs to be taken in any one summer to said mills.

But these defendants aver on information and belief, that said complainant carried to its said Green Bay mills in the season of 1897 more than forty million feet of logs, and in the season of 1898 about thirty-eight million feet, and so far the present season, about fifteen million feet.

They admit that said logs were driven down the said tributaries of said Ontonagon river, and down said river, and to the sorting

grounds and pier jams of complainant, as alleged, but these defendants aver in this connection, that after being driven to said sorting grounds and pier jams, said logs were driven still further down said river into the corporate limits of the village of Ontonagon, within which corporate limits they were taken from the water, at the last boom and sorting gap of said river, and placed on board cars, to be shipped to Green Bay, Wisconsin, via Chicago, Milwaukee & St. Paul railway, and passed out of Michigan at a point near Iron Mountain.

Third. These defendants allege that within the village limits of the village of Ontonagon is situate the last boom or sorting gap of the said Ontonagon river, from which last boom or sorting gap the logs of the complainant have been, and are, all taken and placed upon cars for shipment as aforesaid, and that the village of Ontonagon is the place in this State nearest to said last boom and
45 sorting gap, and that at said last boom and sorting gap said logs, whenever they have been shipped in the past, and when the present season in course of shipment, is the last place in said Ontonagon river where said logs are floated before shipment by rail as aforesaid.

Fourth. That these defendants have no knowledge sufficient to form a belief as to the truth of that part of paragraph "Third" of the bill from the beginning thereof to the statement that the logs therein mentioned were in the township of McMillan.

They admit that on the breaking up of the ice, and on or about the middle of May, 1899, complainant began driving a portion of said logs down the Ontonagon river, and continued doing so from then until about June 15th, 1899, until it had taken down said river and into its booms and pier jams, or sorting grounds at or near the mouth of said river, and outside of the village of Ontonagon ten million feet of logs; but these defendants deny that the greater portion of said ten million feet remain there, and aver on information and belief that all of said ten million feet have been driven further down said river to said last boom and sorting gap and shipped by rail as above described; and they deny that none of said logs were within the corporate limits of said village until and after June 15th, 1899.

They deny that not to exceed four hundred thousand feet of the logs at any one time since the date last aforesaid have been within the corporate limits of said village, and they aver on information and belief that from five hundred thousand to seven hundred thousand feet have been constantly within the limits of said village since the autumn of 1898.

They admit that the quantity last aforesaid, and the quantity spoken of in said paragraph "Third" as four hundred thousand feet, have been in the limits of said village for the purpose of shipment out of the same by rail, as in said bill alleged.

46 Fifth. Touching the matters relating to the question whether said property is subject to taxation in the said village of Ontonagon, these defendants say that they are advised and believe, and thereupon allege the fact to be, that all of the property men-

tioned in said bill of complaint, whether the same be more or less than is alleged in said bill, namely, all the logs in the Ontonagon river and its tributaries belonging to the complainant intended to be removed down said stream to and into the village of Ontonagon, thence to be shipped by rail as in said bill alleged, are, under and by virtue of the laws of Michigan, taxable in said village of Ontonagon as well as in said township of Ontonagon, said village last named being in said township last named. And they further aver that all of said property so situated, be the same more or less in quantity, are forest products and are in transit to a place without the State of Michigan, namely, in said Green Bay.

That the water transit of said property has heretofore ceased, and will continue to cease, in the village of Ontonagon and in said township of Ontonagon, whence the same is and is to be shipped by rail as aforesaid. That said Ontonagon river and its tributaries are streams of water or rivers all within the State of Michigan and within the county of Ontonagon, in which said village of Ontonagon is situate.

Seventh. These defendants admit that the law of Michigan in force in respect to the assessment of such property is set forth with substantial correctness in paragraph "Fourth" of the bill, and that certain provisions of the law of Michigan relating to villages are set forth with substantial accuracy in paragraph "Fifth" of the bill.

Eighth. As to the matters set forth in paragraph "Seventh" of the bill of complaint, these defendants on information and belief deny that the township of McMillan claimed the right to tax all of
47 complainant's logs, and deny that said township assessed all of complainant's logs for the year 1899, and aver upon information and belief that the assessment made by said township of McMillan, and in said paragraph "Seventh" referred to, was an assessment only of logs banked in unbroken rollways on the Ontonagon river, or on a tributary thereof, in said township of McMillan at the time said assessment was made, to wit, on the second Monday of April. But these defendants have no knowledge sufficient to form a belief whether said township of McMillan intends to levy a tax by virtue of said assessment, or to collect the same from said complainant or its property.

Ninth. As to the matters set forth in paragraph "Eighth" of the bill, these defendants aver on information and belief that the township of Ontonagon has the right to assess and tax all of complainant's logs which in this answer it is claimed the said village of Ontonagon has the right to assess and tax; but these defendants, so far as they have information, believe it to be true, that said township of Ontonagon has assessed said property and will levy a tax on the same in the manner and to the amount alleged in paragraph "Eighth" of the bill.

Tenth. These defendants admit the truth of the facts set forth in paragraph "Ninth" of the bill, except that they deny that none of complainant's logs were or ever came within the limits of the village of Ontonagon until after the 1st day of June, 1899, nor until after the proper time for the completion of the assessment of the property

within said village by the assessor thereof for the purpose of levying taxes thereon was passed, and in this behalf aver, as they have before averred, that there was within the corporate limits of said village at all times after the autumn of 1898, between five hundred thousand and seven hundred thousand feet of logs belonging to said complainant within said corporate limits.

48 Eleventh. As to paragraph "Tenth" of the bill of complaint, these defendants deny that the assessment of complainant's logs by the village of Ontonagon was illegal, fraudulent or void, and allege as aforesaid that such assessment was valid; deny that said village had no right to place said logs on its assessment-roll for the purpose of levying taxes thereon for the year 1899; deny that said village has no right to collect the tax levied thereon; deny that said village has no right to tax logs in transit; deny that no portion of said logs was within the corporate limits of said village at the time they were placed on the assessment-roll for the year 1899; deny that no portion of said logs had ever been, prior to that time, within said limits; admit that only a portion of said logs is now in said village, and that for the purpose of being shipped therefrom; deny that the amount of taxes levied by said village against complainant on account of its ownership of said logs is either excessive, exorbitant, or greater than the amount allowed to be taxed in any one year by said village upon property of the valuation of said logs, and aver, on information, advice and belief, the contrary of each and all of said matters. These defendants have no knowledge sufficient to form a belief whether the placing of said logs on the assessment-roll of said village was without the knowledge of the complainant, or whether complainant learned thereof before or after the time of the sitting of the board of review at the lawful time for the review of assessments.

Twelfth. As to the matters set forth in paragraph "Eleventh" of the bill, these defendants admit the truth thereof.

Thirteenth. As to paragraph "Twelfth" of the bill, these defendants have no knowledge sufficient to form a belief as to the truth thereof.

Fourteenth. As to paragraph "Thirteenth" of the bill, these defendants deny, on information and belief, that the valuation

49 of one hundred thousand dollars placed upon said property by the township of Ontonagon was exorbitant or excessive, or higher, relatively, than other personal property was assessed in said township for that year, and aver, upon information and belief, that complainant was apprised of said valuation at and before the session of the board of review of said township for the year 1899.

Fifteenth. As to paragraph "Fifteenth" of the bill, these defendants admit the truth thereof.

Sixteenth. In connection with paragraph "Fifth" and paragraph "Ninth" of the bill of complaint, and paragraph sixth of this answer, these defendants aver that in addition to the legislation of Michigan touching villages and touching the defendant, The Village of Ontonagon, set forth in paragraph "Fifth" of the bill, and in addition to other legislation of Michigan touching villages and the

said village of Ontonagon, the legislature of Michigan made the following enactments, to wit: act number 319 of the Laws of Michigan of the year 1893, entitled: "An act to allow the village of Ontonagon, in the county of Ontonagon and State of Michigan, to borrow money and issue bonds in the sum of thirty thousand dollars, to build water works and electric lighting plant." Which act was approved March 24th, 1893, and took immediate effect. And act number 283 of the Laws of Michigan of the year 1895, entitled "An act to allow the village of Ontonagon, in the county of Ontonagon and State of Michigan, to borrow money and issue bonds in the sum of twelve thousand dollars, to extend its system of water works and to complete its electric lighting plant." Approved February 13th, 1895, and ordered to take immediate effect.

And these defendants aver that pursuant to, and in accordance with, the terms of said two acts of the legislature last mentioned, and in accordance with a vote of the electors of said village at elections duly held under and in accordance with the said acts,
50 and pursuant to the action of the village council of the village of Ontonagon duly had in pursuance of said acts, the said village of Ontonagon in the year 1893 or 1894 borrowed the sum of thirty thousand dollars and issued its bonds therefor and sold the same, and in the year 1895 borrowed the further sum of twelve thousand dollars and issued its bonds therefor and sold the same, and that all of said bonds to the amount, reckoning principal and interest, of about forty thousand dollars, are now outstanding in the hands of *bona fide* holders and owners and constitute a charge against said village and against the taxable property thereof. And these defendants aver that, as stated in paragraph "Ninth" of said bill of complaint, out of six thousand seven hundred fifty dollars ($6,750.00) levied against said complainant as a tax upon its said logs, twelve hundred fifty dollars ($1,250.00) is for general purposes, being one and one-fourth (1¼) per cent. on such assessment. Five hundred dollars ($500.00) is for highway purposes, being five mills (.005) on each one dollar of such assessment, and five thousand dollars ($5,000.00), being five (5) per cent. on such assessment, is for the payment of certain of said bonds due and shortly to fall due, and for the payment of interest on said bonds. And these defendants aver that said village of Ontonagon, by virtue of the provisions of law set forth in the bill of complaint, and by virtue of the acts of the legislature, the titles of which are in this paragraph above set forth, had the right to raise by tax each and all of said amounts, and further aver that the village council of said village duly authorized the raising by tax in the year 1899 of the three above-named amounts for the several purposes above stated.

These defendants further aver the fact to be that all of the logs of said complainant in said river or stream and its tributaries were at the time of the assessment of 1899 made by the authorities
51 of said village and township of Ontonagon, in transit within the meaning of the laws of Michigan touching the taxation of logs and forest products in transit.

These defendants further aver that for ten years, or thereabouts, pre-

vious to the destruction by fire of complainant's mills at Ontonagon, said township of Ontonagon assessed for taxation year by year, all of said complainant's logs in said river and its tributaries, whether situate at the time of assessment in said Ontonagon township, or in other townships in said county of Ontonagon, or in the county of Gogebic, through part of which latter county part of said river and its tributaries run, as in transit to said mills in Ontonagon, and that said complainant acquiesced in such assessment, and for said years paid the taxes levied thereon year by year without protest, and that for two years after the destruction by fire of said mills, said township of Ontonagon in like manner assessed all of said logs so afloat as in transit, and that said complainant acquiesced in like manner in said assessment, and paid without protest (except as to 1898 a general protest, and not on the ground that said logs were not in transit) the taxes levied in said assessments in said above-named two years year by year. And defendants further aver that during all of said years, before and after the destruction of their said mills, said complainant treated said logs as in transit to their said mills in Ontonagon and Green Bay respectively.

JNO. HAWLEY,
President of the Village of Ontonagon.
GEORGE DUCLEAUX,
Treasurer of the Village of Ontonagon.

A. E. SHUSTER,
Solicitor for Defendants, Ontonagon Village & Geo. Ducleaux, Treas.

Business address, Ontonagon, Michigan.

CHADBOURNE & REES, *Of Counsel.*

52 STATE OF MICHIGAN, } *ss:*
County of Ontonagon, }

On this 3rd day of November, A. D. 1899, personally appeared before me, John Hawley and George Ducleaux, who being by me severally sworn, depose and say, the said John Hawley that he is president of The Village of Ontonagon, one of the defendants in the foregoing answer, and George Ducleaux, that he is treasurer of said village, and both say that they have read the foregoing answer by them subscribed and know the contents thereof, and that the same is true except as to matters therein set forth on information and belief, and as to those matters they believe it to be true.

[SEAL.] C. MEILLEUR,
Notary Public, Ontonagon Co., Mich.

(Endorsed:) 148. United States circuit court for the western district of Michigan, northern division. The Diamond Match Co. *vs.* The Village of Ontonagon, and George Ducleaux, *et al.*, treasurer. Answer. Filed Nov. 4 1899. F. M. Moore, dep. clerk. A. E. Shuster, sol'r for defendants, Ontonagon Village & Geo. Ducleaux. Chadbourne & Rees, of counsel.

53 And afterwards, to wit. on the 20th day of November, A. D. 1899, came the complainant, by its solicitors, and filed in the office of the clerk of said court, in said entitled cause, a certain replication in words and figures as follows, to wit:

54–59 UNITED STATES OF AMERICA:

United States Circuit Court, Western District of Michigan.

DIAMOND MATCH CO.
vs.
VILLAGE OF ONTONAGON ET AL.

Replication of the complainant to the joint and several answer of the Village of Ontonagon and George Ducleaux, treasurer thereof.

And now comes the complainant The Diamond Match Company, a corporation, and for replication to the joint and several answer of the Village of Ontonagon and George Ducleaux, treasurer thereof, says, that notwithstanding the joint and several answer of said defendants that it, the complainant, is entitled to the relief prayed for in its bill of complaint.

DIAMOND MATCH COMPANY,
By WALKER & PAYNE, *Its Solicitors.*

WALKER & PAYNE,
Solicitors for Complainant.

(Endorsed:) 148. In the U. S. circuit court, western district of Michigan. Diamond Match Co. *vs.* Village of Ontonagon. Replication. Filed Nov. 20 1899. Chas. L. Fitch, clerk. Walker and Payne, sol'rs for compl't.

* * * * * * * *

60 And afterwards, to wit, on February 25th, A. D. 1901, came the complainant, by Edwin Walker, its solicitor, and by leave of court first had and obtained, filed with the clerk of said court its amendment to its bill of complaint herein, which said amendment is in words and figures following, to wit:

61 In the Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE DIAMOND MATCH COMPANY
vs.
VILLAGE OF ONTONAGON and GEORGE DUCLEAUX, Treasurer.

It is hereby stipulated by and between the counsel for the complainant and defendants The Village of Ontonagon and George Ducleaux, treasurer, in said cause, that the following amendment may be filed to the complainant's bill of complaint herein, by inserting at the close of the sixth line of the tenth paragraph of the said bill of complaint, the following:

"That the taxes charged in said bill of complaint to have been assessed and levied by the officers of said defendant, The Village of Ontonagon under the statutes of the State of Michigan, under the provisions of which taxes were assessed, were illegal and void, because said taxes were assessed in violation of and repugnant to the general provisions of the Constitution of the United States; and especially because said taxes were assessed in violation of, and said statutes of the State of Michigan are in violation of and repugnant to those parts of section 8 of article 1 of the Constitution of the United States, which provide, that: 'The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States,' and section 10 of said article, which provides that: 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

62

EDWIN WALKER,
Counsel for Complainant.
CHADBOURNE & REES,
Counsel for Defendants.

(Endorsed:) Circuit court of the United States, western district of Michigan, northern division. The Diamond Match Co., *vs.* The Village of Ontonagon & George Ducleaux, treas. Amendment to bill. Filed Feb. 25 1901. F. M. Moore, dep. clerk.

63 And afterwards, to wit, on March 6th, A. D. 1901, in the September term of said court 1900, in the record of proceedings thereof in said entitled cause, before the Honorable George P. Wanty, district judge, appears the following entry, to wit:

64 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern Division, Western District of Michigan. In Equity.

THE DIAMOND MATCH COMPANY, Complainant,
vs.
THE VILLAGE OF ONTONAGON, a Municipal Corporation; GEORGE Ducleau, Treasurer of the Village of Ontonagon; The Township of McMillan, a Quasi-public Corporation, and The Township of Ontonagon, a Quasi Corporation, Defendants.

On reading and filing the stipulation of the said complainant and the said defendants, The Township of McMillan and The Township of Ontonagon, on motion of Messrs. Walker & Payne, solicitors for said complainant.

It is ordered that the bill of complaint heretofore filed in this cause may be dismissed as against said defendants, The Township of Ontonagon and The Township of McMillan, respectively, without costs to be taxed.

Dated March 1st, A. D. 1901.

(Endorsed:) No. 148. The circuit court for the county of Marquette, northern division. Diamond Match Co. *vs.* The Village of Ontonagon, *et al.* Order dismissing. Filed Mar. 6 1901. F. M. Moore, dep. clerk. Ball & Ball, of counsel for co'pl't. Business address, Marquette, Mich.

65 And afterwards, to wit, on the 25th day of February, A. D. 1901, in the record of proceedings thereof in said cause, before the Honorable George P. Wanty, district judge, the following opinion was rendered, and an order entered in accordance therewith, dismissing the bill of complaint, which said opinion and order thereon are in words and figures as follows, to wit:

66 In the Circuit Court of the United States for the Western District of Michigan.

DIAMOND MATCH COMPANY
vs.
VILLAGE OF ONTONAGON and GEORGE DUCLEAUX, Treasurer, ET AL.

The complainant is a corporation organized under the laws of the State of Illinois and files its bill of complaint against the defendants to restrain the collection of a tax levied by the defendant Village of Ontonagon on logs which at the time of the assessment were at various places in and along the banks of the Ontonagon river in the State of Michigan. They were destined to be delivered at the complainant's mill at Green Bay in the State of Wisconsin to be there manufactured. Within the village of Ontonagon was the last boom or sorting gap from which the logs were to be taken and placed upon railroad cars for transportation to Green Bay and this boom or sorting gap is the last place where the logs are floated before shipment by rail. The logs on which the assessment was made had been for more than a year within the county of Ontonagon in and along the banks of the Ontonagon river and its tributaries. The law in force in the State of Michigan at the time the tax was levied relative to the taxation of forest products and logs in transit is as follows: "Personal property of non-residents of the State, and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township,
67 on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within the State it shall be assessed in such place, except that where such property is in transit to some place without the State it shall be assessed at the place in this State nearest to the last boom or sorting gap of the stream in or bordering on this State in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any water-course in or bordering on this State,

then such assessment shall be made at the point where such property will naturally leave the State in the ordinary course of its transit and such property so in transit to any place without the State shall be assessed to the owner or person, persons, or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons or corporation operating upon such stream, then such property may be assessed to such person, persons, or corporation, and the person, persons, or corporation so assessed for any such property belonging to a non-resident of this State shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment, or for money had and received, any amount which the person, persons or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied: Provided, further that any owner, or person, interested in said property may secure the release of the same from such lien by giving to the person, persons or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200) with two sufficient sureties, conditioned
68 for the payment of such tax by such owner or person interested, and the saving of the person, persons or corporation assessed from payment thereof and from costs, damages and expense on account of its non-payment, which bond as to amount and sufficiency of security shall be approved by the county clerk of the county in which the assessment is made."

It is admitted by the parties to this suit that the assessment was not valid unless, as a question of law, the village of Ontonagon had the right to assess the logs which were in the river outside the limits of the village as being in transit under the statute of the State of Michigan above quoted. I do not see how this case can be distinguished from that of Elk Rapids Iron Co. *vs.* Township of Helena, 117 Mich. 211. In that case the logs which were on the banking grounds were held assessable at Elk Rapids, the place of their destination, because under a statute which provided that "where such property is in transit to some place within the State, it shall be assessed in such place," it was held that the logs for the purpose of taxation were in transit. The statute under which the assessment in controversy was made provides "that where such property is in transit to some place without the State, it shall be assessed at the place in this State nearest to the last boom or sorting gap of the stream in or bordering on this State in which said property will naturally be last floated during the transit thereof." This court is bound by the construction of a State statute made by the highest court of the State and there is no reason to believe that the statute under consideration would be given a different construction from that in the case of Elk Rapids Iron Company *vs.* Township of Helena, and therefore, for the purposes of taxation under this statute, the

logs upon which this assessment was made were in transit
69 from the time they were cut in the woods with the intention to have them transported to the complainant's mill at Green Bay for manufacture, and were properly assessed at the village of Ontonagon, that being "the place in this State nearest to the last boom or sorting gap of the stream in or bordering on this State in which said property will naturally be last floated during the transit thereof."

It is contended by the complainant that if these logs were in transit then they are the subject of interstate commerce and not taxable by the State authorities. I think under the construction of the statute by the supreme court of Michigan, these logs were in transit at the time the assessment was made for the purpose of taxation but not in the sense used in those judgments holding property to be the subject of interstate commerce within the meaning of the Federal Constitution and acts of Congress. The supreme court of Michigan holds that for the purpose of taxation when logs are cut with the intention of transporting them, they are in transit, but there is no case holding that the mere intention to ship property where no act has been done looking to its actual transportation, would make such property a subject of interstate commerce. Under the facts in this case these logs would not be a subject of interstate commerce until they were taken from the boom or sorting gap for the purpose of loading them on the cars for transportation to the mills of complainant at Green Bay. This was held in the case of Coe *vs.* Errol, 116 U. S. 517, referred to by complainant's counsel, where Justice Bradley cites the cases on this subject and comes to the conclusion that goods or products of a State intended for exportation to another State are liable to taxation as part of the general mass of property in the State of their origin until actually started in the course of transportation to the State of their destination and delivered to a common carrier for that purpose; but the
70 depositing of them at a depot for transportation is no part of the exportation itself, and the state of the owner's mind in relation to the goods and his intent to export them and his partial preparation to do so, does not exempt them from taxation. I think this property was subject to taxation, by the village authorities of Ontonagon, under the statute of the State of Michigan, and that the statute is not unconstitutional in attempting to tax a subject of interstate commerce. The bill must be dismissed.

GEO. P. WANTY,
U. S. District Judge.

(Endorsed:) 148. In the circuit court of the United States for the western district of Michigan. Diamond Match Company *vs.* Village of Ontonagon and George Ducleaux, treasurer, *et al.* Opinion. Filed Feb. 25 1901. F. M. Moore, dep. clerk.

71 In the Circuit Court of the United States for the Western District of Michigan, Northern Division. In Equity.

THE DIAMOND MATCH COMPANY
vs.
THE VILLAGE OF ONTONAGON; GEORGE DUCLEAU, Treasurer of said Village; The Township of McMillan, and The Township of Ontonagon.

At a session of said court held at Marquette in said western district of Michigan on the 25th day of February, in the year nineteen hundred and one.

Present: Hon. George P. Wanty, district judge.

This cause having duly come on to be heard upon the pleadings filed therein and upon the stipulations of fact entered into between the parties, also filed therein, and upon the proofs taken and filed therein, and having been argued by counsel, namely, by Walker and Payne, solicitors for said complainant, on behalf of said complainant, and by A. E. Shuster, solicitor, and Chadbourne and Rees, of counsel for said defendants, The Village of Ontonagon and George Ducleau, treasurer of said village, and after mature consideration by the court of said pleadings and said stipulations, and it appearing to the court, upon said hearing that the complainant is not entitled to the relief prayed for in said bill of complaint, on motion of A. E. Shuster, solicitor for the defendants above named, it is ordered, adjudged and decreed that the said bill of complaint be dismissed, and that the said defendants, The Village of Ontonagon and Geoige Ducleau, treasurer of said village, do recover against the said complainant, The Diamond Match Company, their costs in and about this suit expended to be taxed and that said defendants have execution thereof.

72 (Endorsed:) No. 148. The circuit court of the United States for western district of Michigan, northern division. Diamond Match Company, complainant, *vs.* The Village of Ontonagon & George Ducleaux, treasurer of said village *et als.*, defendants. Decree dismissing bill. Entry approved. Geo. P. Wanty U. S. dist. judge. 1 March 1901. Filed & entered Feb'y 25 1901. F. M. Moore, dep. clerk.

73 And afterwards, to wit, on the 23rd day of March, A. D. 1901, came the complainant by Edwin Walker, its solicitor, and filed in the office of the clerk of said court, its petition praying for an appeal from the order dismissing the bill of complaint, said petition having attached thereto the assignment of errors, which said petition and said assignment, and the order of the court entered upon said petition allowing said appeal are in words and figures as follows, to wit:

74 UNITED STATES OF AMERICA, *Western District of Michigan, Northern Division,* } ss:

In the Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE DIAMOND MATCH COMPANY
vs.
THE VILLAGE OF ONTONAGON and GEORGE DUCLEAU, Treasurer of said Village. } In Equity.

To the Honorable George P. Wanty, district judge and one of the judges of the above-named court, presiding:

The Diamond Match Company, complainant in the above-entitled suit in equity, considering itself aggrieved by the order and decree made and entered herein on the 25th day of February A. D. 1901, in the above-entitled cause, doth hereby appeal from the said decree and from the whole thereof, to the Supreme Court of the United States, and it prays that this, its appeal may be allowed, and that a transcript of the record and the proceedings and papers upon which said order and decree were founded, after due authentication, may be sent to the Supreme Court of the United States.

And the complainant further prays that an order may be entered in said cause, allowing said appeal, and upon the filing of its bond in the penal sum of ten thousand dollars ($10,000.00), with the American Surety Company, a corporation, as surety conditioned as required by law and the rules of this court, that the temporary injunction heretofore granted by said court, shall continue in force until the final disposition of said appeal.

75

EDWIN WALKER,
Solicitor for Complainant.

Appeal allowed to the Supreme Court of the United States, upon the filing of an appeal bond in the sum of $10,000 with the American Surety Company, a corporation, as surety, conditioned as required by law and the rules of this court, within thirty days from the date hereof.

And it is further ordered, that the temporary restraining order heretofore entered in said cause shall continue in force during said thirty days, and upon the filing of said bond within said period of time, said temporary injunction shall continue in force until the final disposition of said appeal, or the further order of said Supreme Court, and that said bond shall operate as a supersedeas.

GEO. P. WANTY,
U. S. District Judge.

The petitioner, for assignment of errors, says, that there is manifest error in the judgment and proceedings in this cause, to wit:—

First. The circuit court of the United States, for the western district of Michigan, northern division, erred, in holding that the statute of the State of Michigan, under and by authority of which

complainant's property was assessed for taxation, was not in contravention and repugnant to section 8 article 1 of the Constitution of the United States.

Second. The said circuit court erred in ordering and de-
76 creeing that the complainant's bill in said cause be dismissed for want of equity.

For which errors and each of them, petitioner prays that the judgment of the circuit court of the United States for the western district of Michigan, northern division, be reversed and in all things set aside.

EDWIN WALKER,
Solicitor for Petitioner.

(Endorsed:) 148. United States circuit court, western district of Michigan, northern division. Diamond Match Co. *vs.* Village of Ontonagon *et al.* Petition for appeal & order of allowance & assignments of error. Filed Mar. 23 1901. F. M. Moore, dep. clerk.

77 And afterwards, to wit, on the 21st day of March A. D. 1901, there was filed in the office of the clerk of said court, in said entitled cause, a certificate of evidence, which said certificate of evidence is in words and figures as follows, to wit:

78 T. L. Chadbourne. A. F. Rees.

Law office Chadbourne & Rees, Houghton, Mich.

DIAMOND MATCH CO.
vs.
VILLAGE OF ONTONAGON ET AL.

This record, with alterations and inserts #1, #2 and #3, as attached, is satisfactory to us.

CHADBOURNE & REES.

79 UNITED STATES OF AMERICA,
Western District of Michigan, Northern Division, } ss:

In the Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE DIAMOND MATCH COMPANY
vs.
THE VILLAGE OF ONTONAGON and GEORGE DUCLEAU, Treasurer of said Village.

Be it remembered and certified that the above-entitled cause was submitted for final hearing at this term of court upon the bill of complaint, the answers to said bill and the replications to such answers, and the evidence and upon the following stipulations of fact, to wit:—

It is hereby stipulated between the complainant, on the one hand, and the defendants, The Village of Ontonagon and George Ducleaux,

its treasurer, on the other, that the following statements of fact are true, and may be used in evidence on the bearing of said cause by either of the parties to this stipulation, subject to objection for immateriality.

1. Complainant shipped by rail from the village of Ontonagon to its mills at Green Bay, Wisconsin, for sawing there, the following quantities of logs, at the following times out of its logs in the Ontonagon river, described in the bill of complaint.

Forty-two million feet in the season of 1897; thirty-seven
80 million feet in the season of 1898, and fourteen million feet in the season of 1899 up to the date of the seizure of logs by the village of Ontonagon for the satisfaction of the tax levied and assessed in and by said village in the year last named.

2. Within the village of Ontonagon, is, and has been, situated in and throughout the year 1899 the last boom or sorting gap in said river, from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid.

3. During the season of 1899, beginning about June 1st, and up to the time of the seizure above mentioned, about — million feet of the ten (10) million feet of logs mentioned in the bill of complaint, were driven down the said river from the boom, pier jams, or sorting grounds outside of said village, to the boom or sorting gap within said village, above described, and shipped thence by rail to complainant's said mills at Green Bay.

4. About five hundred thousand feet of complainant's said logs in said river have been (in said river of slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid.

5. The village of Ontonagon is a duly incorporated village under the general law of Michigan, to wit: act number 3 of the Laws of Michigan of the Year 1895, entitled "An act to provide for the incorporation of villages within the State of Michigan, and defining their powers and duties," and is situate on said river and in The Township of Ontonagon, one of the defendants herein.

6. The water transit of said logs of complainant has hereto-
81 fore always ceased since the burning of complainant's mills, described in the bill of complaint, in said village, whence the same are shipped by rail as aforesaid.

7. Said river and its tributaries are streams of water or rivers, all within the State of Michigan and within the county of Ontonagon (and as to some small part within the counties of Gogebic and Houghton) in which county of Ontonagon said village is situated.

8. Pursuant to and in accordance with the acts of the legislature of Michigan mentioned in the answer of said village in this suit, namely act number 319 of the Laws of 1893, and act number 263 of the year 1895, and pursuant to and in accordance with a vote of the electors of the said village, duly held therein, and pursuant to, and in accordance with the action of its council, said village in the year

1894, borrowed the sum of thirty thousand dollars ($30,000), and issued and sold its bonds therefor, and in the year 1895 borrowed the further sum of twelve thousand dollars ($12,000) and issued its bonds therefor, and all of said bonds, being in principal and interest about forty thousand dollars ($40,000), were at the date of filing the bill of complaint in this cause, outstanding, and said bonds outstanding constitute a valid charge against said village and against the taxable property thereof.

EDWIN WALKER,
Solicitor for Complainant;
THE VILLAGE OF ONTONAGON,
A Municipal Corporation, and
GEORGE DUCLEAUX, *Its Treasurer,*
Defendants,
By A. E. SHUSTER, *Their Solicitor.*

It is hereby further stipulated by and between the complainant and the defendants Village of Ontonagon, and George Du-
82 cleau, its treasurer, that the following statements of fact are true, and may be used in evidence on the hearing of said cause by either of the parties to this stipulation, subject to objections for immateriality, to wit:

1. That the complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, in said State; that it is engaged, and has been from the date of its organization, in the manufacture and sale of matches, and that in the prosecution of its business it purchased and became the owner of a large amount of pine wood, timber, etc., situate on the Ontonagon river and its tributaries in Ontonagon county and other counties in the State of Michigan, and that for many years prior to 1896, it owned, and operated extensive saw-mills and plant near the mouth of the Ontonagon river, and within the corporate limits of the defendant Village of Ontonagon; that in its usual course of business, it cut or purchased a sufficient quantity of timber to supply its mills during the following season, not exceeding forty million of feet, board measure, and placed the same during the winter upon and in said Ontonagon river and its tributaries, there to remain until the breaking up of the ice in said river in spring time, when they were and are driven down the river to the pier jams, booms and sorting grounds of the complainant, located above said mills, and outside of the limits of the defendant, The Village of Ontonagon.

2. That in the summer of the year 1894, extensive forest fires swept over said pine lands of the complainant, and other pine lands, situate on said Ontonagon river, doing great damage to the timber thereon; that in order to preserve the timber so injured by said fire, it became and was necessary to cut all of said timber and put the same into the waters of the above-named stream for preservation; that
83 during the winter of 1894 and 1895, said complainant in order to preserve said timber, was compelled to cut and did cut about one hundred and eighty million feet of logs, and for the

sole purpose of preservation placed the same in said river and its tributaries, there to remain until the complainant could float said logs down said river and streams to its mills to be manufactured into lumber; that it was not the intention or purpose of the complainant after the opening of navigation and during the season of 1896 to remove all of said logs, but only such amount as could be manufactured at its said mills during the season, and that the capacity of said mills did not exceed about the amount of forty million feet per annum, as hereinbefore stipulated.

3. That the navigation of said river and stream is closed by reason of the formation of ice, about the first of December of each year, and is not open until after the first of May, following in each year.

4. That in the month of August A. D. 1896, the complainant's said mills were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul railway, from Ontonagon to its sawmills located at Green Bay, in the State of Wisconsin. That in the regular prosecution of its business of manufacturing said logs into lumber, said complainant has not during any season since 1896, transported a larger quantity of said logs than it could manufacture into lumber at its mills at Green Bay, said quantity being on an average of less than forty million feet of logs, board measure.

5. That for the purpose of preserving said logs and preventing the same from floating down said river and into Lake Superior, said complainant, was compelled to and has utilized certain jam piers, booms and appurtenances, constructed by the plaintiff across said river, more than one mile above the mouth thereof, and be-
84 yond the limits of said village of Ontonagon; that by reason of said appliances, said logs have been held in said river and upon the banks thereof above said jam piers, booms, etc., said complainant only passing through said piers such quantities as it could transport and manufacture into lumber at its said mills from time to time during each successive season since the year 1896; that during each successive season it has been the usual and necessary practice of the complainant to pass through said piers, booms, etc., such quantities of logs as said railway company could furnish facilities for transportation, thence down the river to the place of delivery as described in paragraph 2 of another stipulation of facts made herein, to said railway company, to be loaded upon cars for transportation, and that said place of delivery was near the mouth of said river and within the corporate limits of said defendant The Village of Ontonagon; that all of said logs so delivered to said railway company are transported over its lines to Green Bay, Wisconsin, leaving the State of Michigan at a point near the village of Iron Mountain in said State.

6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant, The Village of Ontonagon, waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire

quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been so held and detained by the complainant in its regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed as charged in said bill of complaint,
were not at the time said assessment was made, and on the
85 second Monday of April, A. D. 1899, were not except as stated
in paragraph 4 of another stipulation made herein, and never had been within the corporate limits of the said defendant The Village of Ontonagon.

7. That the logs in controversy at the time said assessment was made by said defendant, The Village of Ontonagon, were and had been for more than one year prior thereto in the manner above described, held and detained by the complainant within the municipal limits of the township of McMillan in said county of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899, by the proper officers of said township of McMillan, claiming the right so to do under the general statutes and laws of the State of Michigan.

It is further stipulated and admitted by the parties to this stipulation that the assessment of the complainant's logs in controversy was not valid unless it shall be held as a question of law, that the defendant, The Village of Ontonagon had the legal right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit under the statutes of the State of Michigan in such case made and provided.

CHADBOURNE & REES,
Of Counsel for said Defendants.
DIAMOND MATCH COMPANY,
By EDWIN WALKER, *Solicitor.*

It is further stipulated :—

That if the village of Ontonagon was authorized by the laws of Michigan at the time of the assessment and taxation by said village of which complaint is made, to assess and tax complainant for the logs in question as being in transit, although outside the corporate limits of said village, the assessment actually made by it was not
exorbitant or excessive as compared with the assessments of
86 other property subject to assessment and taxation in said
village.

Nothing herein contained shall be taken to admit the right of said village to assess for taxation against said complainant or to tax its logs outside the corporate limits of said village.

EDWIN WALKER,
CHADBOURNE & REES,
Of Counsel for said Defendants.

Evidence af Defendants.

JOSEPH HAIGHT, a witness called by the defendants, testified as follows:

I am supervisor of the township of Ontonagon and have been since April 1897. Assessed the personal property of the complainant The Diamond Match Company for the years 1898 and 1899 in the Ontonagon river in the township of Ontonagon and in other townships outside of Ontonagon, through which the Ontonagon river passes. Assessed all the logs that were considered in transit in the Ontonagon river and its tributaries. In the year 1899 I assessed these logs at $175,000 and the board of review reduced it to $140,000. These logs were in the townships of Ontonagon, McMillan, Matchwood and Rockland. Mr. Wendell appeared before the board of review for the Diamond Match Company in the year 1899. He protested against the whole assessment and laid his protest on the table. For the year 1899 I assessed the logs in the Ontonagon river as in transit on the second Monday in April. We assessed them because we considered the logs to be in transit. I know that the collection of the taxes for the year 1899 for the township of Ontonagon were enjoined. They were afterwards paid, but I do not know whether they were paid by mistake or otherwise. The logs assessed in 1899 were among the logs assessed for the years
87 1897 and 1898. The greater part of the logs assessed for the year 1899 were banked and rolled and put in the river in the winter of 1896. I did not assess for the years 1899, 1898 and 1897 all the logs of the Diamond Match Company in, along or upon the banks of the Ontonagon river and its tributaries. The logs that I did assess were the logs in the river owned by the Diamond Match Company. These were logs that the Diamond Match Company had started to drive. I think the rollways were broken on the second Monday of April in these different years. I do not know of my own knowledge when the Diamond Match Company began driving logs in any of the years mentioned. I do not know how many of the logs were within the corporate limits of the village of Ontonagon on the second Monday of April 1899. I do not know how many of the logs were in the river at the time of the assessment for these respective years.

Redirect:

The Diamond Match Company did not represent to me or to the board of review the quantity of logs that they intended to ship to Green Bay during each or all of said years.

JOHN HAWLEY, a witness called by the defendants, testified as follows:

I reside in the village of Ontonagon, State of Michigan. Was a member of the board of review of the township of Ontonagon in the years 1897, 1898 and 1899. The valuation of the logs for these years was placed upon the logs afloat in the river and its tributaries.

I don't know what proportion of the logs assessed for the year 1899 were in Ontonagon township.

Cross-examination:

I don't know how many of the Diamond Match Company's logs were in the village of Ontonagon on the second Monday of
88 April 1899. Probably half a million feet; I don't know. A fair valuation of the half million feet would be about five dollars a thousand. The assessment of the plaintiff's logs in 1899 was on all the logs of the company in the Ontonagon river and its tributaries. I was village president of Ontonagon in 1899, and approved the assessment-rolls. I know of my own knowledge that the assessment made by the village of the Diamond Match Company's logs, for the year 1899 covered all the logs in the Ontonagon river and its tributaries. I don't know in what townships. I don't know when they were put in the river, nor did I know when the Diamond Match Company began driving logs in the spring of 1899. I understood all the logs taxed by the village in 1899 had been driven previous to the year 1899.

Redirect:

For the years 1897, 1898 and 1899 at the time of the meeting of the board of review, I supposed all these logs were in transit on the second Monday of April to Green Bay, Wisconsin. The last boom or sorting gap for these logs was in the township of Ontonagon and the Ontonagon river is the last water that they would be floating on.

JAMES CORGAN, a witness called by defendants, testified as follows: I was a member of the board of review for the township of Ontonagon for the years 1897, 1898 and 1899, and assisted in fixing the valuation of the Diamond Match Company's logs then in the Ontonagon river and its tributaries. We deemed these logs to be in transit to Green Bay, Wisconsin, and assessed them accordingly. I do not know what part of the logs were considered to be in the township of Ontonagon. The Diamond Match Company did not have other personal property within the township of Ontonagon equaling or anywhere near equaling the value of the logs. If the company had other personal property within the township
89 of Ontonagon for those years of any such value, I should have known it. I think Mr. Wendell, representing the Diamond Match Company, appeared before the board of review for 1899 and filed a written protest on the ground of the assessment of the logs of the company in transit by the township.

Cross-examination:

Was a member of the council of the village of Ontonagon for the year 1899 and as such examined the assessment-rolls. From that examination I can state that the village of Ontonagon did assess the logs of the Diamond Match Company for the year 1899; that they

were then in the Ontonagon river and its tributaries. The greater portion of these logs were not within the corporate limits of the village. I could not tell how many were within the limits. The greater part of the logs were in the river and on its banks, and in the tributaries along their banks.

I cannot say from memory the time when they were put in the river or its tributaries. I know of my own knowledge that the logs assessed by the village and township in 1899 were among the logs that were assessed by the township of Ontonagon in the years 1897 and 1898 and were logs that remained over from those years. It is not true that both the township of Ontonagon and the village of Ontonagon assessed the Diamond Match Company's logs for the year 1899 that were in and along the Ontonagon river and its tributaries on the 2nd Monday in April of that year. There were three million (3,000,000) feet in the Baltimore, together with other logs that had remained where they were originally deposited, that were not taxed. All logs that had moved from their original place of deposit into or down the river were considered *in transitu*, and were assessed by the township board of review and by the village for 1899. The major part of the logs were put in the river some three or four years ago, but some were put in more recently. I knew that the Diamond Match Company had not been
90 making clean drives of the river during these years. In passing down the stream many of the logs have floated ashore and are left there from year to year, and these logs were included in the assessment of the village and township.

And inasmuch, as the matters above set forth, do not fully appear of record in this suit, the complainant tenders these stipulations as admissions of fact, and prays that the same may be certified under the hand and seal of the judge of this court, and thereupon made a part of the record in such cause.

And it is certified accordingly this 21st day of March, A. D. 1901.

GEO. P. WANTY,
U. S. District Judge.

(Endorsed:) 148. United States circuit court, western district of Michigan, northern division. Diamond Match Co., *vs.* Village of Ontonagon *et al.* Certificate of evidence. Filed Mar. 23 1901. F. M. Moore, dep. clerk.

91 And afterwards, to wit, on the 23rd day of March, A. D. 1901, there was filed in the office of the clerk of said court, a certain appeal bond, which said bond, together with the endorsements and certificates thereto attached, is in words and figures as follows, to wit:

92 UNITED STATES OF AMERICA, *ss:*

United States Circuit Court, Western District of Michigan, Northern Division.

THE DIAMOND MATCH COMPANY, a Corporation, Complainant,
vs.
THE VILLAGE OF ONTONAGON, a Municipal Corporation of the State of Michigan, and George Ducleaux, Treasurer of the Village of Ontonagon, Defendants.

Know all men by these presents, that we, the Diamond Match Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, as principal, and the American Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to do a surety business in the State of Michigan, as surety, are held and firmly bound unto said Village of Ontonagon and George Ducleaux, treasurer thereof, in the penal sum of ten thousand dollars ($10,000), lawful money of the United States, to be paid to said village and said treasurer thereof, their successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors or assigns jointly, severally, and firmly by these presents.

Witness our hands and seals this twelfth day of March, A. D. 1901.

Whereas, the said Diamond Match Company, a corporation, did on the 25th day of August, A. D., 1899, file its certain bill in the above-mentioned court against the above-named defendants, to restrain said defendants from in any way levying or seizing any of the
93 property of said complainant or taking any other steps against said complainant to enforce the payment of the taxes levied upon the property of the complainant company for municipal purposes for the year 1899, amounting to the sum of six thousand seven hundred and fifty dollars ($6,750.00), and,

Whereas, on the day and date last mentioned, the said court issued its temporary restraining order in accordance with the prayer of complainant's said bill, which said restraining order was continued in force from time to time, to and until the 25th day of February, A. D., 1901, and,

Whereas, on the said 25th day of February, A. D., 1901, said cause having come on for final hearing, it was decreed by said court that the complainant take nothing by its said bill and that said bill be dismissed for want of equity, and that the said defendants have and recover from the complainant their costs in said suit, and a decree to that effect was accordingly entered on said day, from which said decree of the said circuit court of the United States, for the western district of Michigan, northern division, the said complainant, The Diamond Match Company, has prayed for and obtained an appeal to the Supreme Court of the United States upon the filing of its bond herein in the sum of ten thousand dollars ($10,000), conditioned upon its payment of the said taxes in case it shall fail to prosecute said appeal with effect, said restraining order of said circuit court to remain in full force and effect pending said appeal;

Now, therefore, the condition of this obligation is such, that if the said Diamond Match Company, a corporation, shall prosecute such appeal with effect and answer to the costs and damages awarded to the said defendant if it shall fail to make good its appeal, and shall pay the amount of the taxes above mentioned for the year 1899 which are involved in this litigation, provided the decree of
94 the said United States circuit court, for the western district of Michigan, northern division, shall be affirmed or the appeal dismissed, then the above obligation to be void; otherwise to remain in full force and effect.

Approved:
GEO. P. WANTY,
U. S. District Judge.

THE DIAMOND MATCH CO., [SEAL.]
By J. K. ROBINSON, *Treas.* [SEAL.]
[SEAL.]

Attest:
[SEAL.] RALPH E. WIRT, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *Vice-President.*
CORTLANDT S. VAN RENSSELAER,
[SEAL.] *Attorney.*

(25-cent internal-revenue stamp, cancelled.) 83787.

95 STATE AND COUNTY OF NEW YORK, *ss:*

On this 13th day of March, 1901, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice-president.

K. J. PEIRCEY,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau Co.'s.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company,
96 in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the atttorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at
[SEAL.] the city of New York, this 13th day of March, 1901.

CORTLANDT S. VAN RENSELAER, *Attorney.*

97 American Surety Company of New York; general offices, 100 Broadway.

Incorporated April 14, 1884.

Financial Statement Dec. 31, 1900.

Resources.

Real estate and improvements	$3,028,217.16
Stocks and bonds	1,156,437.50
Bills receivable	662,795.33
Cash in banks and offices	263,930.37
Premiums in course of collection	212,726.12
Accrued interest and rents	30,179.39
	$5,354,285.87

Liabilities.

Capital stock	$2,500,000.00
Surplus	1,000,000.00
Undivided profits	953,290.16
Premium reserve requirement	592,251.67
Claims in process of adjustment	291,616.17
Bills and accounts payable	17,127.87
	$5,354,285.87

98 STATE OF NEW YORK, } ss:
County of New York, }

Henry Tofts, being duly sworn, says: That he is an assistant secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company of New York is worth more than $2,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

HENRY TOFTS.

Subscribed and sworn before me this — day of ——, 1901.

K. J. PEIRCEY,

[SEAL.] *Notary Public, Kings Co.*

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau Co.'s.

(Endorsed:) 148. United States circuit court, western district of Michigan, northern division. The Diamond Match Company, a corporation, complainant, *vs.* The Village of Ontonagon, a municipal corporation of the State of Michigan, *et al.*, defendants. Bond. Filed Mar. 23 1901. F. M. Moore, dep. clerk.

99 And afterwards, to wit, on the 27th day of March, A. D. 1901, there was filed in the office of the clerk of said court, a certain citation, which citation, together with the endorsements of acceptance of service thereon, is in words and figures as follows, to wit:

100 In the Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE DIAMOND MATCH COMPANY
vs.
VILLAGE OF ONTONAGON and GEORGE DUCLEAU, Treasurer of said Village.

UNITED STATES OF AMERICA, *ss:*

To the Village of Ontonagon and George Ducleau, treasurer of said village, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Wash-

ington, on the second Monday of October, A. D. 1901, pursuant to an appeal filed in the clerk's office of the said United States court for the western district of Michigan, northern division, wherein The Diamond Match Company is appellant, and The Village of Ontonagon and George Ducleau, treasurer of said village, are respondents, to show cause, if any there be, why the judgment in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of March in the year of our Lord one thousand nine hundred and one.

GEO. P. WANTY,
U. S. District Judge.

Service accepted, Mar. 25th 1901,
CHADBOURNE & REES,
Counsel for Village of Ontonagon and George Ducleau, Respondents.

101 (Endorsed:) 148. The circuit court of the U. S. for west. dist. of Mich., northern division. In equity. Diamond Match Company *vs.* The Village of Ontonagon and George Ducleaux, treasurer of said village. Citation & proof of service. Filed Mar. 27 1901. F. M. Moore, dep. clerk.

102 UNITED STATES OF AMERICA, *ss:*

United States Circuit Court, Western District of Michigan, Northern Division.

I, Francis M. Moore, deputy clerk of the circuit court of the United States for said northern division, western district of Michigan, do hereby certify the above to be a full, true and complete transcript of all the proceedings had in said court in the cause entitled The Diamond Match Company, a corporation, *vs.* The Village of Ontonagon and George Ducleau, treasurer thereof, as the same appears from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in the city of Marquette, in said division and district, this second day of May, A. D. 1901.

{ Seal of the U. S. Circuit Court, Western District of Mich., Northern Division. }

FRANCIS M. MOORE,
Deputy Clerk.

103 In the Supreme Court of the United States, October Term, A. D. 1901.

Appeal from the circuit court of the United States, western district of Michigan, northern division.

DIAMOND MATCH COMPANY, Appellant,
vs.
VILLAGE OF ONTONAGON ET AL., Appellees.

Statement of Errors upon which Appellant Intends to Rely, and of the Parts of Record Necessary for the Consideration Thereof.

Errors relied on.

First. The circuit court of the United States for the western district of Michigan, northern division erred in holding that the statute of the State of Michigan under and by authority of which complainant's property was assessed for taxation, was not in contravention of and repugnant to section 8 and section 10 of article 1, of the Constitution of the United States.

Second. The said circuit court erred in ordering and decreeing that the complainant's bill in said cause be dismissed for want of equity.

103½ *Parts of Record Designated by Appellant as Material.*

1. Copy of bill of complaint.
2. Answer of defendants The Village of Ontonagon and George Ducleaux, treasurer.
3. Replication.
4. Amendment to bill.
5. Order of court dismissing bill as to the defendants, The Township of McMillan and The Township of Ontonagon.
6. Decree dismissing bill.
7. Petition for appeal, and order of allowance.
8. Certificate of submission of case on bill, answer, replication and stipulations. (Evidence omitted)
9. Bond on appeal.
10. Citation.
11. Clerk's certificate.
12. Opinion of circuit court.

EDWIN WALKER,
Attorney for Appellant.

[Endorsed:] In the Supreme Court of the United States. Diamond Match Co. appellant *vs.* Village of Ontonagon *et al.* appellees. Statement of errors & parts of record to be printed. Edwin Walker att'y for appellant.

104 [Endorsed:] File No. 18,153. Supreme Court U. S. October term, 1901. Term No. 320. The Diamond Match Company, appellant, *vs.* The Village of Ontonagon *et al.* Statement of errors and designation by appellant of parts of record to be printed. Filed June 3, 1901.

105 In the Supreme Court of the United States.

DIAMOND MATCH COMPANY, Appellant,
vs.
VILLAGE OF ONTONAGON ET AL., Appellees.

It is hereby stipulated by and between the parties herein, that the first assignment of error may be amended by adding thereto, after the words section 8, ("and section 10,") so that said assignment of error shall be as follows:

First. The circuit court of the United States for the western district of Michigan, northern division, erred in holding that the statute of the State of Michigan, under and by authority of which complainant's property was assessed for taxation, was not in contravention of and repugnant to section 8 and section 10 of article 1 of the Constitution of the United States.

EDWIN WALKER,
Solicitor for Appellant.
T. L. CHADBOURNE,
Solicitor for Appellees.

[Endorsed:] In the Supreme Court of United States. Diamond Match Co. appellant, *vs.* Village of Ontonagon *et al.* Stipulation. Edwin Walker, att'y for appellant.

106 [Endorsed:] File No. 18,153. Supreme Court U. S. October term, 1901. Term No. 320. The Diamond Match Company, app't *vs.* The Village of Ontonagon *et al.* Stipulation to amend first assignment of error. Filed June 3d, 1901.

107 In the Supreme Court of the United States, October Term, 1901.

DIAMOND MATCH COMPANY, Appellant,
vs.
VILLAGE OF ONTONAGON ET AL., Appellee-. } Number 320.

It is hereby stipulated by the parties in the above-entitled cause, by their respective attorneys, that the clerk may print the evidence contained in the certificate of evidence, in addition to the parts of record designated by the appellant and filed with the clerk of said court June 3rd, 1901.

EDWIN WALKER,
Attorney for Appellant.
T. L. CHADBOURNE,
Attorney for Appellee.

[Endorsed:] #320 In the Supreme Court of the United States Diamond Match Co., appellant *vs.* Village of Ontonagon *et al.*, appellee- Stipulation

108 [Endorsed:] File No. 18,153. Supreme Court U. S. October term, 1901. Term No. 320. The Diamond Match Company, app't, *vs.* The Village of Ontonagon *et al.* Stipulation to print parts of record in addition to those already designated. Filed June 24, 1901.

Endorsed on cover: File No. 18,153. W. Michigan C. C. U. S. Term No. 320. The Diamond Match Company, appellant, *vs.* The Village of Ontonagon, and George Ducleau, treasurer of said village. Filed May 13, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 320.

THE DIAMOND MATCH COMPANY, *Appellants,*

vs.

THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE, *Appellees.*

Appeal from the Circuit Court of the United States for the Western District of Michigan.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

In August, 1899, in the United States Circuit Court for the Western District of Michigan, Northern Division, the appellant filed its certain bill for injunction against the Village of Ontonagon, a municipal corporation in the County of Ontonagon and State of Michigan, and George Ducleau, its treasurer, and the Townships of McMillan and Ontonagon, in said County of Ontonagon.

The essential facts are, that in the years 1894-5, appellant was the owner of a large amount of pine timber lands situate upon the Ontonagon river and its tributaries in said County of Ontonagon. It was also the owner of extensive saw-mills, located near the mouth of

said river and within the limits of the Village of Ontonagon. It was the custom of appellant during the winter months to cut a sufficient amount of timber to keep its mills in operation during the following season. The annual capacity of these mills was some thirty or forty million feet of logs. The lands were situate on the waters of the Ontonagon river and its tributaries many miles beyond the municipal limits of either of the defendant municipalities, and the logs, when cut, were floated down the river to appellant's mills, and there manufactured into lumber, for the use of appellant in the regular prosecution of its business and for sale in open market. By reason of the frozen condition of the waters or the formation of ice in the river, logs could not be floated after about the first days of December until the first of May following, but were cut and placed upon the banks and in the bed of the river during the winter months, and made ready for transportation at the opening of navigation. During the summer of 1894 what is known as a forest fire extended over the lands of appellant, and for its preservation appellant was compelled to cut most of the timber and place it in the bed of the river and its tributaries, and during the winter of 1894-5 it did cut and place in said waters and upon the banks of the streams about 180,000,000 feet of logs preparatory for transportation to its mills near the mouth of the river.

Prior to the filing of this bill, and also prior to 1894, it had been the custom of the appellant and others engaged in similar business on the Ontonagon river, to prepare their logs during the winter months, floating the same down the streams when the water should be suitable, not in rafts, but promiscuously, in large quantities.

For the purpose of holding the logs that were floated down the river and to prevent their being carried by the high water into Lake Superior, appellant had constructed certain jam piers and booms about one mile above the mouth of the river, and beyond the municipal limits of both the Village and Township of Ontonagon. The mass of logs floated down the river during the spring freshets, or high water, were held by these appliances and passed through the jam piers and booms in quantities regulated by the capacity of the mills. The operation of the mills were annually closed about the first of December, and during the winter months, and until about the first of May following, there were practically no logs either in transit or in storage booms between the piers and the mouth of the river.

In May, 1899, appellant was the owner of about 30,000,000 feet of logs either in the Ontonagon river or its tributaries, or piled upon the banks of said river within the township of McMillan, but not within the limits or jurisdiction of either the Village or Township of Ontonagon. Upon these logs, the assessors, or other proper officers of each of the three municipalities, levied an assessment for taxation and made returns of the same to the proper statutory authorities. The assessed valuation for the Township of McMillan was fixed and returned at the sum of $10,000; for the Township and Village of Ontonagon, at $100,000 each, and upon these several valuations, taxes were assessed and levied for the following amounts: By the Township of McMillan about the sum of $1,000; by the Township of Ontonagon, about the sum of $3,000, and by the Village of Ontonagon, the sum of $6,750, and these several amounts were entered upon the assessment rolls against the appellant.

The Township of McMillan claimed the right to make this assessment and levy the tax, as upon property within the township on the second Monday of April, 1899, and the Village and Township of Ontonagon claimed the right to levy such assessment, as upon property in transit. Each of the municipalities claimed authority to levy the tax in controversy, under Section 14, Sub-division 8, Act Number 32, of the Laws of the State of Michigan of 1899, viz.:

> "Personal property of non-residents of the state, and all forest products owned by residents or non-residents or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within the state it shall be assessed in such place, except that where such property is in transit to some place without the state it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any watercourse in or bordering on this state, then such assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit, and such property so in transit to any place without the state shall be assessed to the owner or person, persons or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons or corporation operating upon any such stream, then such property may be assessed to such person, persons or corporation, and

the person, persons or corporation so assessed for any such property belonging to a non-resident of this state shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment or for money had and received, any amount which the person, persons, or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied. Provided, further, that any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons, or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200), with two sufficient securities, conditioned for the payment of such tax by such owner or person interested, and the saving of the person, persons, or corporation assessed from payment thereof, and from costs, damages and expense on account of his non-payment, which bond, as to amount and sufficiency of surety shall be approved by the county clerk of the county in which the assessment is made."

It further appears that in August, 1896, the appellant's mills at the mouth of the Ontonagon river were destroyed by fire and that thereafter its logs were floated down the river to the station or freight yards of the Chicago, Milwaukee & St. Paul Railway, near the mouth of the river, within the municipal limits of the Village of Ontonagon, and thence transported by said railway to appellant's mills, located at Green Bay, in the State of Wisconsin; this was the custom of appellant from and after August, 1896. The 30,000,000 feet of logs in controversy had been floated down the river to the jam piers or booms hereinbefore referred to prior to

the closing of the river in the fall of 1898, and were there held during the winter months, with the intention on the part of the appellant to resume the transportation to Green Bay after the opening of navigation. All of these logs had been either in or upon the banks of the river since the season of 1896. During the winter months it was impossible to float the logs from the jam piers or booms to the yards of the railway for transportation. The entire quantity of logs in controversy during the winter of 1898-9 were held by the frozen condition of the river above the jam piers, and within the municipal limits of the Township of McMillan, and were so held at the time of the assessment and levy in April, 1899.

Upon the filing of the bill, and after due consideration by the court, an interlocutory order was entered in said cause, restraining the three municipalities and their officers from collecting the taxes levied by each of the defendants, until the further order of the court. Subsequently, by stipulation of the parties, the bill of complaint was dismissed as against the defendants, the Township of Ontonagon and the Township of McMillan.

At the September term of court, A. D. 1900, the cause coming on for final hearing, upon the pleadings, stipulations of facts, and upon proofs, the court, after argument by counsel and due consideration, entered its final decree in said cause, dismissing said bill for want of equity.

The evidence which appears in this record has but little bearing, if any, upon the issues, as the stipulations of the parties were presumed to contain all the facts necessary for the final consideration of the cause. The last stipulation filed, which was intended to cover, not only

the preceding stipulations, but to embody all of the essential facts, is as follows:

"It is hereby further stipulated by and between the complainant and the defendants, Village of Ontonagon, and George Ducleau, its treasurer, that the following statements of fact are true, and may be used in evidence on the hearing of said cause by either of the parties to this stipulation, subject to objections for immateriality, to wit:

1. That the complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the City of Chicago, in said state; that it is engaged, and has been from the date of its organization, in the manufacture and sale of matches, and that in the prosecution of its business it purchased and became the owner of a large amount of pine-wood, timber, etc., situate on the Ontonagon river and its tributaries in Ontonagon County, and other counties in the State of Michigan, and that for many years prior to 1896, it owned and operated extensive saw-mills and plant near the mouth of the Ontonagon river, and within the corporate limits of the defendant Village of Ontonagon; that in its usual course of business, it cut or purchased a sufficient quantity of timber to supply its mills during the following season, not exceeding forty million feet, board measure, and placed the same during the winter upon and in said Ontonagon river and its tributaries, there to remain until the breaking up of the ice in said river in spring time, when they were and are driven down the river to the pier jams, booms and sorting grounds of the complainant, located above said mills and outside of the limits of the defendant, the Village of Ontonagon.

2. That in the summer of the year 1894, extensive forest fires swept over said pine lands of the complainant, and other pine lands, situate on said Ontonagon river, doing great damage to the timber

thereon; that in order to preserve the timber so injured by said fire, it became and was necessary to cut all of said timber and put the same into the waters of the above-named stream for preservation; that during the winter of 1894 and 1895, said complainant, in order to preserve said timber, was compelled to cut and did cut about one hundred and eighty million feet of logs and for the sole purpose of preservation placed the same in said river and its tributaries, there to remain until the complainant could float said logs down said river and streams to its mills to be manufactured into lumber; that it was not the intention or purpose of the complainant after the opening of navigation and during the season of 1896 to remove all of said logs, but only such amount as could be manufactured at its said mills during the season, and that the capacity of said mills did not exceed about the amount of forty million feet per annum, as hereinbefore stipulated.

3. That the navigation of said river and stream is closed by reason of the formation of ice about the first of December of each year, and is not open until after the first of May, following in each year.

4. That in the month of August, A. D. 1896, the complainant's said mills were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul Railway from Ontonagon to its saw-mills, located at Green Bay, in the State of Wisconsin. That in the regular prosecution of its business of manufacturing said logs into lumber, said complainant has not during any season since 1896 transported a larger quantity of said logs than it could manufacture into lumber at its mills at Green Bay, said quantity being on an average of less than forty million feet of logs, board measure.

5. That for the purpose of preserving said logs and preventing the same from floating down said river and into Lake Superior said complainant was compelled to and has utilized certain jam piers, booms and appurtenances, constructed by the plain-

tiff across said river, more than one mile above the mouth thereof, and beyond the limits of said Village of Ontonagon; that by reason of said appliances said logs have been held in said river and upon the banks thereof above said jam piers booms, etc., said complainant only passing through said piers such quantities as it could transport and manufacture into lumber at its said mills from time to time during each successive season since the year 1896; that during each successive season, it has been the usual and necessary practice of the complainant to pass through said piers, booms, etc., such quantities of logs as said Railway Company could furnish facilities for transportation, thence down the river to the place of delivery as described in paragraph 2 of another stipulation of facts made herein, to said Railway Company, to be loaded upon cars for transportation, and that said place of delivery was near the mouth of said river and within the corporate limits of said defendant, the Village of Ontonagon; that all of said logs so delivered to said Railway Company are transported over its lines to Green Bay, Wisconsin, leaving the State of Michigan at a point near the Village of Iron Mountain in said state.

6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant the Village of Ontonagon waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had, since that date, been so held and detained by the complainant in its regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed, as charged in said bill of complaint,

were not, at the time said assessment was made, and on the second Monday of April, A. D. 1899, were not, except as stated in paragraph 4 of another stipulation herein, and never had been within the corporate limits of the said defendant, the Village of Ontonagon.

7. That the logs in controversy, at the time said assessment was made by said defendant, the Village of Ontonagon, were and had been for more than one year prior thereto in the manner above described, held and detained by the complainant within the municipal limits of the Township of McMillan in said County of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899 by the proper officers of said Township of McMillan, claiming the right so to do under the general statutes and laws of the State of Michigan.

It is further stipulated and admitted by the parties to this stipulation that the assessment of the complainant's logs in controversy was not valid unless it should be held as a question of law, that the defendant, the Village of Ontonagon, had the legal right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit under the statutes of the State of Michigan in such case made and provided.

It is further stipulated:

That if the Village of Ontonagon was authorized by the laws of Michigan, at the time of the assessment and taxation by said village of which complaint is made, to assess and tax complainant for the logs in question, as being in transit, although outside the corporate limits of said village, the assessment actually made by it was not exorbitant or excessive as compared with the assessments of other property subject to assessment and taxation in said village.

Nothing herein contained shall be taken to admit the right of said village to assess for taxation against said complainant, or to tax its logs outside the corporate limits of said village."

The appellant prayed and perfected its appeal from the final decree, assigning as errors relied on, the following:

> "*First.* The Circuit Court of the United States for the Western District of Michigan, Northern Division, erred in holding that the statute of the State of Michigan, under and by auhority of which complainant's property was assessed for taxation, was not in contravention of, and repugnant to, Section 8 and Section 10 of Article 1, of the Constitution of the United States.
>
> *Second.* The said Circuit Court erred in ordering and decreeing that the complainant's bill in said cause be dismissed for want of equity."

Points and Citations.

I.

THE VILLAGE OF ONTONAGON HAD NO POWER TO ASSESS PROPERTY FOR TAXATION AND LEVY TAXES THEREON, EXCEPT AS SPECIALLY CONFERRED BY THE GENERAL OR SPECIAL STATUTES OF THE STATE OF MICHIGAN.

Compiled Laws of Michigan, Vol. 1, page 913, Secs. 1, 2 and 6;

Cooley on Taxation, pp. 96, 209, 474;

Dillon's Municipal Corporations, 4th Ed., Sec. 763;

In re Second Avenue M. E. Church, 66 N. Y., 395;

Washington Avenue, 69 Pa. St., 352;

English v. *People of the State of Illinois*, 96 Ill., 566.

II.

THE STATE OF MICHIGAN COULD NOT BY LEGISLATIVE GRANT AUTHORIZE THE VILLAGE OF ONTONAGON TO IMPOSE A TAX UPON THE PROPERTY OF NON-RESIDENTS, WHEN THE SITUS OF SUCH PROPERTY WAS BEYOND ITS MUNICIPAL LIMITS AND JURISDICTION.

Wells v. *Weston*, 22 Mo., 384;

In the Matter of the Assessment of Lands, etc., 60 N. Y., 398;

Trigg v. *Glasgow*, 2 Bush, 594;

City of St. Louis v. *Ferry Company*, 11 Wall. 430.

III.

THE STATUTE OF THE STATE OF MICHIGAN, UNDER AND BY AUTHORITY OF WHICH THE COMPLAINANT'S PROPERTY WAS ASSESSED FOR TAXATION, IS IN CONTRAVENTION OF, AND REPUGNANT TO, THE CONSTITUTION OF THE UNITED STATES.

Coe v. *Errol*, 116 U. S., 517.
The Daniel Ball, 10 Wall, 557-565;
State Freight Tax, 15 Wall, 272.

IV.

UNDER THE ADMITTED FACTS, EQUITY HAS JURISDICTION TO ENJOIN THE COLLECTION OF THE TAX.

Cooley on Taxation, 2d Ed., p. 784;
Pacific Hotel Co. v. *Lieb*, 83 Ill., 602;
Railway Company v. *Cole*, 75 Ill., 591;
Cook County v. *Railroad Co.*, 35 Ill., 460;
Bank of Kentucky v. *Stone*, 88 Fed. Rep., 383;
Ogden City v. *Armstrong*, 168 U. S., 224;
High on Injunctions, Sec. 530;
Smyth v. *Ames*, 169 U. S., 515;
Hazard v. *O'Bannon*, 36 Fed. Rep., 855;
High on Injunctions, Sec. 502;
Parmalee v. *Railroad Companies*, 3 Dillon, 25.

ARGUMENT.

I.

THE VILLAGE OF ONTONAGON HAD NO POWER TO ASSESS PROPERTY FOR TAXATION AND LEVY TAXES THEREON, EXCEPT AS SPECIALLY CONFERRED BY THE GENERAL OR SPECIAL STATUTES OF THE STATE OF MICHIGAN.

It is admitted that the Village of Ontonagon was incorporated under the general statutes of the State of Michigan, with power to levy and collect taxes, as therein provided. The sections of the statute conferring this authority are made a part of the bill. (Trans., p. 4.) Defendants in error, in their answer to this bill, admit that the law of Michigan in force with respect to the assessment of the property in controversy is set forth with substantial accuracy in the bill of complaint. (Trans., p. 13.) Section 1 of the statute provides that:

> "The Common Council shall have authority to raise by general tax upon the real and personal property liable to taxation in said village such sum as they shall deem necessary for the purposes of defraying the general expenses and liabilities of the corporation, not exceeding in any one year one-fourth of one per cent. of the assessed value of such property."

The power of taxation conferred upon the village authorities by this statute, and to levy and collect taxes upon real and personal property, is confined to property located within the corporate limits of the village.

It is a well recognized rule, that all laws granting

municipalities the right to levy and collect taxes, must be construed with strictness—nothing is taken by implication.

In this jurisdiction the court is so familiar with the rule, that we shall cite but few authorities in its support.

In Cooley on Taxation, the learned author repeatedly emphasizes the principle. On page 96 he says:

> "As to municipal bodies it is conceded that they have no power to levy taxes unless it is specially conferred by the legislature. It is also conceded that any special authority must be strictly pursued or the action of the municipality under it will be invalid."

Again, on page 209:

> "In the construction of any grant of the power to tax made by the state to one of its municipalities, the rule which is accepted by all the authorities is, that it should be with strictness. The reasonable presumption is held to be, that the state has granted in clear and unmistakable terms, all that it has intended to grant at all; and whatsoever authority the municipal officers assume to exercise, they must be able to show the warrant for in the words of the grant. There is no inherent power in the municipalities to levy taxes; they can tax only as the state in its wisdom has thought proper to permit, and if the state has erred in the direction of strictness, the legislature alone can correct the evil."

Also, p. 474:

> "It has also been assumed that all local powers must have their origin in a grant by the state, which is the source and foundation of authority. The power to tax is no exception to this general rule. Every municipal corporation, and every political division of the state which demands taxes from the people must be able to show due authority from the state to make the demand. The authority in some

> cases conferred by the state constitution, but if not found there, it must be given by legislative enactment. No person is compellable to pay taxes for imposing which the authorities are unable to show a legislative grant of power."

To the same effect, Dillon's Municipal Corporations, 4th Ed. Sec., 763, to wit:

> "POWER TO TAX MUST BE PLAINLY CONFERRED. It is a principal universally declared and admitted, that municipal corporations levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred."

In re Second Avenue M. E. Church, 66 N. Y., 395, the court held, that

> "A municipal corporation, seeking to affect property within its jurisdiction by taxation or proceedings in the nature thereof, must produce express power therefor in legislative enactment, and must show that it has strictly followed all the legal requirements."

In Washington Avenue, 69 Pa. St., 352, the court, in its opinion discusses at length the whole theory of local taxation and the procedure which must be had in order to render the same constitutional, and holds that the power of taxation cannot be exercised, except by direct statutory authority.

Also, in *English* v. *The People of the State of Illinois*, 96 Ill., 566, the validity of a tax levied by the City of Joliet was the only matter under discussion or consideration. In the opinion by Mr. Justice SCHOLFIELD, the court adopts the rule of Judge Dillon, in his work on Municipal Corporations, above cited, and held, that

> "As municipal corporations can levy no taxes, general or special, unless the power be plainly and

unmistakably conferred, it devolves upon the people, on an application for judgment upon a city tax, to show that such tax has the sanction of law for its support."

Appellant denies the authority of the taxing officers of the Village of Ontonagon to assess its property for taxation, situate beyond its municipal limits. The village authorities had no jurisdiction over this property at the time the assessment was made. It was at the time situated within the municipal jurisdiction of the Township of McMillan, and was assessed by that township for taxation. The location of the property at the time the assessment was made, is admitted by the parties in the 6th and 7th paragraphs of their stipulation of facts, as follows (Trans., p. 27):

"6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant, the Village of Ontonagon, waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been so held and detained by the complainant in its regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed as charged in said bill of complaint, were not at the time said assessment was made, and on the second Monday of April, A. D. 1899, were not, except as stated in paragraph 4 of another stipulation made herein, and never had been within the corporate limits of the said defendant, the Village of Ontonagon.

> "7. That the logs in controversy at the time said assessment was made by said defendant, The Village of Ontonagon, were and had been for more than one year prior thereto in the manner above described held and detained by the complainant within the municipal limits of the township of McMillan in said County of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899, by the proper officers of said Township of McMillan, claiming the right so to do under the geneard statutes and laws of the State of Michigan."

Paragraph 6 of the stipulation is qualified by Paragraph 4 of another stipulation, made a part of the record. (Trans., p. 25. Paragraph 4 is as follows:

> "4. About five hundred thousand feet of complainant's said logs in said river have been (in said river or slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid."

Our contention is, that as the property in controversy at the time the assessment for taxation was made, was not and never had been within the municipal limits of the Village of Ontonagon, the alleged assessment was without statutory authority and wholly void.

II.

THE STATE OF MICHIGAN COULD NOT BY LEGISLATIVE GRANT, AUTHORIZE THE VILLAGE OF ONTONAGON TO IMPOSE A TAX UPON THE PROPERTY OF NON-RESIDENTS, WHEN THE SITUS OF SUCH PROPERTY WAS BEYOND ITS MUNICIPAL LIMITS AND JURISDICTION.

We have shown that at the time the assessment was made, the situs of the property assessed for taxation was not within the municipal limits of the Village of Ontonagon, and never had been within the jurisdiction of appellee.

It is a recognized axiom that the state itself has no right or power to impose taxes upon persons or property beyond the limits of the state; its sovereignty extends no further. The same principle limits the power of taxation of municipalities; it has no power to impose taxes upon persons or property beyond its limits; "its sovereignty extends no further."

The general principle underlying and authorizing all taxation is, that property should contribute to the support of the government that affords it protection. The property of the appellant, wherever situate in the State of Michigan, is protected by the laws and authorities of the state, but the Village of Ontonagon afforded no protection whatsoever to such property, and could afford no protection beyond the corporate limits of the municipality.

The precise question was argued and considered by the court in *Wells* v. *Weston*, 22 Mo., 384. This was a petition by Wells to set aside a sale of his land, made under the authority of the City of Weston, for the payment of a tax which the city claimed the right to levy and collect, and to enjoin execution of the deed. The charter of the city provided that inhabitants might own property either within or without city limits for burial purposes. Section 1 of Article 5 of the charter empowered the city to levy and collect taxes upon all property within city limits. The 36th section of the same article empowered the city to assess and collect a tax on all real estate without, and adjacent to the corporation, to the distance of one-half mile. Under this section of the charter the city levied a tax on all property within a half mile of the city. The plaintiff owned certain property

coming under this tax, and upon his refusal to pay the tax, the land was sold by the city collector. A demurrer to the plaintiff's bill was sustained and exception taken. In the opinion of the court it is said:

> "The question that has been argued before us upon this record, and the only one that we have considered is, whether it is competent for the legislature to confer upon the City of Weston authority to tax, for local purposes, land lying beyond the corporate limits. We have considered the matter with all the care that it is our duty to do, when we are required to decide upon the constitutional validity of a legislative act; but being clearly of opinion that this provision of the charter violates the constitutional rights of the citizen, which we are bound to protect, we are constrained to pronounce accordingly. * * *
>
> "Although it be true, as a general proposition, that the legislature can not delegate their legislative power, but must exercise it themselves under their appropriate responsibilities; yet the practice of creating municipal corporations—with subordinate legislative power over the local affairs of the inhabitants, and, as incident to this, with authority to impose taxes upon the persons and things within the local jurisdiction in order to supply the local necessities, being firmly established, and daily practiced by our American governments when our constitution was adopted, must be considered as an ordinary legislative power, and one, of course, that our legislature may lawfully exercise. But no instance, it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction for their own local purposes; and if the legislature possess the power, now claimed, over private property, they ought to exercise it themselves, and not delegate it to those whose interest it is to abuse it."

The essential facts are, that the complainant's logs assessed for taxation by the Village of Ontonagon for the year 1899 were at the date of the assessment as fixed by statute, located in other townships, and were assessed by the proper taxing officers of such townships. The appellant was, and is, a corporation of the State of Illinois, and was not, and could not be, a resident or citizen of the Village of Ontonagon.

The matter of the *Assessment of Lands in the Town of Flatbush, etc.*, 60 N. Y., 398, was an application by the commissioners of Prospect Park to have their assessment against the lands in the above town for the benefit of the park confirmed. The lands upon which the assessment was levied were situated in the town of Flatbush, beyond the limits of the City of Brooklyn, and it was contended that the assessment was unauthorized by law. The Court of Appeals held the assessment to be unauthorized and illegal, and in its opinion, among other things, said:

> "Had the respondents been originally assessed for benefit conferred under a proper law it might then be said that the assessment was for public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not this case. And those assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted; and to contribute money which is to be paid into a sinking fund, and to be appropriated for the payment of bonds, already issued, for the location and improvement of the park. There is no principle, that I am aware of, which sanctions the doctrine that it is within the taxing power of the legislature to compel one town, city or locality to contribute to the payment of the debts of another. The government has no such authority, and this case is entirely without a precedent. If

such assessments were authorized they might not be limited to adjoining towns, cities or villages, but applied to those located at great distances from each other such legislation would be unjust, mischievous and oppressive, and cannot be tolerated. None of the acts in question, therefore, for the reason last stated, in any sense gave authority to the commissioners to impose the burden of the assessments made upon the town of Flatbush."

To the same effect, *Trigg* v. *Glasgow*, 2 Bush., 594.

Under charter of the Barren County Railroad, Glasgow subscribed $50,000. To pay for this Section 16 of the Glasgow charter provided: It shall be the duty of the trustees to levy an *ad valorem* tax on all property within said town, that is listed for state purposes, including the amount given in under the equalization law.

An amendment provided that all taxable property in said town shall be subject to taxation for payment of said subscription, and also all property which was removed from the town within a certain period of time for the purposes of evading taxation.

Trigg, a citizen of Glasgow, refused to list any property under the equalization law, but listed his other property in Glasgow at $5,000. The assessor on *ex parte* evidence increased the list $50,000, by adding mercantile interests in Louisville. This suit was brought to enjoin the collection of the supplemental tax.

The court held that the charter of the Village of Glasgow only authorized the taxation of property within its limits, and that complainant's property not situated in Glasgow was exempt from taxation, and enjoined the collection of the tax.

City of St. Louis v. *Ferry Company,* 11 Wall., 430.

This was an action for the recovery of taxes alleged to be due from the Ferry Company to the city. A statute of Missouri enacts that "shares of stock and all other interests held in steamboats, keel-boats, wharf-boats and all other vessels" shall be taxable for state purposes; and by its charter the City of St. Louis has authority to tax all property within the city so taxable.

In this state of statutory enactment the city authorities of St. Louis laid a tax on the value of all ferry-boats used by the Wiggins Ferry Company in ferrying passengers and cargo on the Mississippi river, between the City of St. Louis, Missouri, and East St. Louis, Illinois, on the opposite shore.

The ferry company was incorporated by the laws of Illinois, but had its principal office in St. Louis, Missouri. There its president, vice-president, treasurer, superintendent and other chief officers resided.

The ferry company refused to pay the tax, on the ground that these boats were not "property within the city."

The court, speaking by Mr. Justice SWAYNE, said:

> "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

III.

THE STATUTE OF THE STATE OF MICHIGAN, UNDER AND BY AUTHORITY OF WHICH COMPLAINANT'S PROPERTY WAS ASSESSED FOR TAXATION, IS IN CONTRAVENTION OF, AND REPUGNANT TO, SECTIONS 8 AND 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

In the court below the appellant challenged the validity of the state statute, under which appellees claim authority to levy the tax assessment in controversy, as being in contravention of the Constitution of the United States. (Trans., p. 18.)

The statute, referred to, enacted and in force on and after the 8th day of April, 1899, was copied into the bill and made a part of the record, to wit (Trans., p. 3):

> "Personal property of non-residents of the state, and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within the state it shall be assessed in such place, except that where such property is in transit to some place without the state it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any water course in or bordering on this state, then such assessment shall be made at the

point where such property will naturally leave the state in the ordinary course of its transit, and such property so in transit to any place without the state shall be assessed to the owner or person, persons or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons, or corporation operating upon any such stream, then such property may be assessed to such person, persons or corporation, and the person, persons or corporation so assessed for any such property belonging to a non-resident of this state shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment, or for money had and received any amount which the person, persons or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied: Provided, further, that any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200) with two sufficient securities, conditioned for the payment of such tax by such owner or person interested, and the saving of the person, persons or corporation assessed from payment thereof, and from costs, damages and expense on account of his non-payment, which bond as to amount and sufficiency of surety shall be approved by the county clerk of the county in which the assessment is made."

This statute provides that personal property of non-residents of the state "and all forest products owned by residents or non-residents" shall be assessed in the township or ward where the same may be, to the person hav-

ing control of the premises, on the second Monday of April of the year when the assessment is made,—

> "except that where such property is in transit to some place within the state, it shall be assessed in such place. That where such property is in transit to some place without the state, it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof; *and in case the transit of any such property is to be other than through any water-course in or bordering on this state, then such assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit.*"

In the fourth paragraph of the stipulation of facts (Trans., p. 27), it is admitted that in the month of August, 1896, the complainant's mills at Ontonagon were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul Railway Company, from Ontonagon, to its saw-mills, located at Green Bay, in the State of Wisconsin. Also

> "that all of said logs so delivered to said Railway Company are transported over its lines to Green Bay, Wisconsin, leaving the State of Michigan at a point near the Village of Iron Mountain in said state."

Appellees claim the right to assess these logs under the section of the statute quoted as being in transit, and that they were assessable in the Village of Ontonagon, because they were there transferred from the Ontonagon river to the cars of the Railroad Company, and that this was appellant's last boom or sorting place for said logs.

The Circuit Court held, that:

> "For the purposes of taxation under this statute, the logs upon which this assessment was made were in transit from the time they were cut in the woods with the intention to have them transported to the complainant's mill at Green Bay, for manufacture, and were properly assessed at the Village of Ontonagon, that being 'the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof.'" (Trans., p. 21).

Evidently the learned chancellor overlooked the fact, admitted by the stipulation, that it was the intention of appellant to float the logs in controversy down the Ontonagon river for delivery to the Railroad Company, as soon as the condition of the water would permit, and that from Ontonagon they were to be transported by rail to Green Bay, leaving the State of Michigan at the Village of Iron Mountain.

After quoting the statute, the Circuit Court, in its opinion, said:

> "It is admitted by the parties to this suit, that the assessment was not valid unless, as a question of law, the Village of Ontonagon had the right to asess the logs which were in the river outside the limits of the village as being in transit under the statute of the State of Michigan above quoted." (Trans., p. 20.)

This statement finds support in the last paragraph of the stipulation of facts, to wit:

> "It is further stipulated and admitted by the parties to this stipulation, that the assessment of the complainant's logs in controversy was not valid, unless it should be held as a question of law, that the defendant, the Village of Ontonagon, had the legal

> right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit, under the statutes of the State of Michigan, in such case made and provided."

Under this stipulation and the opinion of the Circuit Court, it is apparent that the validity of this statute is the controlling question in this controversy.

The court held that it was bound by the construction of the statute, made "by the highest court of the State of Michigan," and cites *Elk Rapids Iron Company* v. *Township of Helena,* 117 Mich., 221, as controlling.

That was an action in assumpsit, by the Elk Rapids Iron Company against the Townships of Helena and Milton, to recover taxes paid under protest. The plaintiff was a manufacturing corporation, prosecuting its business in Elk Rapids, where its plant, stores, offices and place of business were located. It used annually a large amount of forest products, procured from the neighboring townships. The products were conveyed from these townships along streams and lakes to its plant in Elk Rapids. The timber was cut during the winter, placed upon the banks of the streams, and floated to Elk Rapids after the opening of navigation. Navigation commenced about May 1st. The authorities of Milton and Helena townships levied local taxes upon the property. The Iron Company, the owner of the property, claimed that under the statute the logs could not be assessed, except at Elk Rapids, the place of their destination. The taxes were paid under protest. In the trial court judgments were rendered for the defendants, but these judgments were reversed by the Supreme Court, where judgments were entered for the plaintiffs.

This case was decided by the Supreme Court of the State of Michigan in 1898. The statute that received the consideration and construction of the court was Section 15 of the Acts of 1893, which specially provided that all forest products in transit or on the banks or shore of any lake, pond, or stream, of this state shall be held to have a place of destination at the sorting grounds nearest the mouth of the stream, unless the contrary should be made to appear by the owner or party having the same in charge; and the court held in that case, that the logs in controversy were subject to taxation in the Township of Elk Rapids, their place of destination,—and were not subject to taxation in the townships where the logs were piled upon the banks of the stream awaiting a favorable condition of the water for transportation.

This statute was amended April, A. D. 1899, and the amended statute was in force at the time the assessment in controversy was made. The amended statute provides, that all forest products owned by residents or non-residents, shall be assessed in the township or ward where the same may be, to the person having control of the premises, except

> *"that where such property is in transit to some place within the state, it shall be assessed in such place,"*

and also the further exception,

> *"that where such property is in transit to some place without the state, it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state, in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any water-course in or bordering on this state, then such assess-*

ment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit, etc."

I am not aware that the Supreme Court of Michigan has put any construction upon this section of the statute, but it would seem to be the intention of the legislature, that property in transit to some place within the state should be assessed as of the place of destination; that if it is to be floated down the rivers or streams to a destination without the state, in such case the property should be assessed at the last boom or sorting gap of the stream in or bordering on the state. Also, if the property is to be transported without the state by any means of transportation, other than the water course, or partly by rail and partly by other methods of transportation, then the assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit.

It is admitted that all of the appellant's logs were to be floated down the river to a point within the Village of Ontonagon, where they were to be transferred from the stream to the cars of the Chicago, Milwaukee & St. Paul Railway Company, and from thence transported by rail to Green Bay, Wisconsin; that in the regular line of transit to Green Bay property would leave the state at a point near the Village of Iron Mountain in the State of Michigan, and it would therefore seem under this statute, the property in transit, if assessed at all, should have been assessed in the Village of Iron Mountain.

We believe that the court erred in its construction of the statute of 1899, and its application to the matters in controversy. Relative to our contention that the statute,

so far as it authorizes the assessment of property in transit from a point within the State of Michigan to a place without the state, is repugnant to the Constitution of the United States, the Circuit Court said:

> "It is contended by the complainant that if these logs were in transit then they are the subject of inter-state commerce and not taxable by the state authorities. I think, under the construction of the statute by the Supreme Court of Michigan, these logs were in transit at the time the assessment was made for the purpose of taxation, but not in the sense used in those judgments holding property to be the subject of inter-state commerce within the meaning of the federal constitution and acts of Congress. The Supreme Court of Michigan holds that for the purpose of taxation when logs are cut with the intention of transporting them, they are in transit, but there is no case holding that the mere intention to ship property where no act has been done looking to its actual transportation, would make such property a subject of interstate commerce. Under the facts in this case these logs would not be a subject of inter-state commerce until they were taken from the boom or sorting gap for the purpose of loading them on the cars for transportation to the mills of complainant at Green Bay." (Trans., p. 21.)

Under the admitted facts both the river and the railroad were utilized in the transportation of the logs from the Township of McMillan and other points on the Ontonagon river, to Green Bay, in the State of Wisconsin. Had the Ontonagon river extended to Green Bay, or to the state line, then, under the statute, the logs would have been assessable at the place in the State of Michigan "nearest the last boom or sorting gap of the stream in or bordering on the state," and in such case there can be no question that the property would be a subject of inter-state commerce. But in this case, the property was not

in transit through "any water-course in or bordering on this state," but, on the contrary, its transportation was down the river to a point within the Village of Ontonagon and thence transferred to the railroad, and, therefore, if assessable at all within the State of Michigan, it would be "at the point where such property naturally left the state in the ordinary course of its transit."

The movement of this property commenced with the opening of navigation of the river, and from that date it was a continuous transit until it reached its place of destination at Green Bay, and during its entire transit was a subject of interstate commerce, whether the transit was by water, or by railroad, or both water and railroad.

We have said that the statute of 1899 has not been before the Supreme Court of Michigan for construction. The precise question, however, was involved in the case of the *City of Menominee* v. *The Menominee River Boom Company*, in the Circuit Court of Menominee County and decided during the past year. In that case the logs were floated down the river, passing through the City of Marinette, Wisconsin. The city assessed the property to the Boom Company under the statute of 1899. The Boom Company denied the validity of the assessment, claiming that the property was in transit to a point without the state, was the subject of interstate commerce, and that the law of 1899 in that respect was repugnant to the Constitution of the United States.

The opinion of the court is as follows:

> "I shall not spend much time in disposing of this case. I think the Circuit Court ought not to be hasty in passing upon statutes and holding them to be unconstitutional; and it is only in a very clear case where I think the court ought to take that responsibility, ordinarily passing the matter along to the Supreme Court.

But when we come to consider that the Constitution of the United States is the supreme law of the land, any state constitution or law to the contrary, notwithstanding; and a provision of the statute is in direct conflict with the constitution, wherein it attempts to tax commerce, it seems to me that the court ought not to hesitate.

This case, by the proof, is brought within this category; that the logs were, on the second Monday of April, in transit in the rivers of this state to a point outside of the state, by a continuous route, down the Menominee river and its tributaries.

Now this statute provides that 'Personal property of non-residents * * * except that where such property is in transit to some place within the state it shall be assessed in such place.'

Then comes the provision, 'except where such property is in transit to some place without the state * * * in the ordinary course of its transit,' etc.

I think that the plaintiff is bound by the proposition that this property was in transit at the time of the assessment. That being the fact, it was governed by the interstate commerce rules and regulations and was non-taxable here. That this property may, as a matter of fact, have been situated at a point in this state where it might have been properly assessed in this state, in the township where it was situated, may be true. But that is not the position here which the plaintiff is bound to take, by the assessment roll and other proof, and by the stipulations in the case.

I think there is a great deal of force, too, in saying that you cannot assess property to this Boom Company here that has not yet reached it, being in transit. It is different from the proposition of the Company having the possession of property, in its mill, dock, yard, etc., where the property may be assessed to such persons, they having a right to pay the tax on the property in their possession and under their control, on which they may have a lien and hold it for their lien. But so far as the proof shows

> these logs may not even have reached the jurisdiction of this Boom Company at this time. They are simply in transit to a place without the state. I think the statute is unconstitutional and void. That has been my opinion from the start, and I shall so hold until the Supreme Court sets us right."

The streams of northern Michigan are extensively used for the transportation of forest products to points within and points without the state, and while the opinion in the Menominee case is not a judicial authority, still it is a construction put upon the statute of 1899 by a court of northern Michigan, familiar with this method of transportation, and of the rights of the parties under the statute.

The Circuit Court held that "under the facts in this case, these logs would not be a subject of interstate commerce until they were taken from the boom or sorting gap for the purpose of loading them on the cars for transportation to the mills of the complainant at Green Bay," and cites in support of this contention *Coe* v. *Errol*, 116 U. S., 517. We do not think this case supports the opinion of the Circuit Court. In the case cited the plaintiff filed a petition in the Supreme Court of New Hampshire against the Town of Errol for an abatement of taxes.

The facts were, that the plaintiff was the owner of a large number of spruce logs that during the winter had been placed in Clear Stream and on the banks thereof, in the Town of Errol, to be thence floated down the Androscoggin river to the State of Maine to be manufactured and sold. These logs were assessed in the Town of Errol for taxation at $6,000. There was another lot of logs belonging to the plaintiff, which had been cut in the

State of Maine and were on their way of being floated to Lewiston, Maine, but were detained in the Town of Errol by low water. These logs were also assessed for taxation by the officers of the Town of Errol; they were also assessed to the plaintiffs, as stock in trade at the Town of Lewiston. The State Supreme Court of New Hampshire held that the tax assessed upon logs cut in the State of Maine should be abated, and that the tax assessed upon logs cut in the State of New Hampshire, and placed on the banks of the river in the Township of Errol, should be sustained. The case was brought to this court on writ of error to the Supreme Court of the State of New Hampshire. Mr. Justice BRADLEY, speaking for the court, said:

> "The question for us to consider, therefore, is, whether the products of a state (in this case timber cut in its forests) are liable to be taxed like other property within the state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another state." (p. 524.)
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> * * * * *
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> This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the constitution. *And so, we think, would the goods in question be when actually started in the course of transportation to another state or delivered to a carrier for such transportation.*"

It is here held that if the goods are actually started in the course of transportation to another state, then

they will become the subjects of interstate commerce, and the material question in the Errol case was, whether the goods had as a matter of fact, started in the course of transportation; if so, they are "under the protection of the Constitution."

The error of the Circuit Court was in holding that the logs in controversy could not be subject of interstate commerce until they were received from the river for transportation to the mills of the complainant. It is admitted in this case, as a fact, that complainant's logs were actually started in the course of transportation to Green Bay, at a point on the Ontonagon river beyond the municipal limits of the Village of Ontonagon, and were floated down to the yards, and there delivered to the Railway Company for the balance of the transportation.

It is further admitted that these logs were, as a matter of fact, in transit, and therefore the defendants claimed the right to assess the logs for taxation; otherwise, under the facts, there could be no pretense for this tax assessment.

In the *Errol* case, the essential question was, whether the property was actually in transit or not, while in the case at bar it is admitted that the property was in transit,

[redacted]

Mr. Justice BRADLEY further said:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common

> carrier for transportation out of the state to the state of their destination, *or have started on their ultimate passage to that state.*

In the present case the logs had started on their ultimate passage in the course of transportation, before this assessment was made, and in their regular course of transportation simply passed through the precincts of the Village of Ontonagon.

On page 526 it is further said:

> "Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding."

In the case at bar the complainant's logs were not assessed in the usual way for the reason that at the date of the assessment they were not within the corporate limits of the Village of Ontonagon, and therefore were assessed because of 'their anticipated departure' from the Township of McMillan to Green Bay, Wisconsin, passing through the Village of Ontonagon. This court was careful to draw a distinction between property held by its owner, intended for exportation, and property actually in motion by due course of transportation to some point or place without the state, and cites with approval

the case of *The Daniel Ball,* 10 Wall., 557-565, wherein it is said:

> "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

In the case, *supra,* the court further said:

> "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

And in the case of the *State Freight Tax,* 15 Wall., 272, this court said:

> "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

The agency adopted by the complainant for the transportation of its property to Green Bay was the navigation of the river so far as practicable, and thence by railway to the place of destination, and under the method adopted the property was in transit from the time it left the boom above the jam piers, situate in the Township of McMillan. By stipulation of the parties, this essential fact is admitted, and upon this theory the case was submitted to the Circuit Court. The tax was levied under the section of the statute authorizing the assessment of property for taxation while in transit to some place without the State of Michigan. So much of the statute as attempts to confer such authority, we respectfully submit, is repugnant to the Constitution, and therefore the tax levy here complained of is wholly void.

IV.

UNDER THE ADMITTED FACTS, EQUITY HAS JURISDICTION TO ENJOIN THE COLLECTION OF THE TAX.

The jurisdiction of the Assessor of the Village of Ontonagon to assess property for taxation did not in any case extend beyond the limits of the municipality, nor had he authority to assess complainant's property as in transit from a place within the Township of McMillan, in the State of Michigan, to Green Bay, in the State of Wisconsin, and therefore the levy of the tax and such assessment was not merely voidable, but, on the contrary, was absolutely void, and in law was a fraud upon the complainant. Equity has jurisdiction to enjoin the collection of a void tax.

In Cooley on Taxation, 2d Ed., p. 784, under the title of "Taxation of Personal Property," the learned author says:

> "A tax founded on a fraudulent assessment will be enjoined. An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive, but if it is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction. So in any case in which a tax is rendered unequal or unfair by fraudulent or reckless conduct of officers, or in which the party is deprived by like practices of important rights which the law intends to secure to him; such, for instance, as the right of appeal from an assessment or to be heard by the

board of review before his assessment should be raised. But mere irregularities in the proceedings of tax officers do not make out fraud, or even give evidence of it. And fraud must be alleged and proved. All presumptions are against it." Citing:

Pacific, etc., Co. v. *Lieb,* 83 Ill., 602.

Gage v. *Evans,* 90 Ill., 569.

Chicago, etc., R. Co. v. *Cole,* 75 Ill., 591.

Ottawa, etc., Co. v. *McCaleb,* 81 Ill., 556.

Referring to the Illinois cases cited by the author, we call the court's attention to *Pacific Hotel Co.* v. *Lieb,* 83 Ill., 602.

This was a bill in equity to enjoin the collection of taxes levied upon the personal property of the complainant. We quote from the syllabus:

"Owing to the diversity of opinion as to the value of property, it has always been held that a court of equity will not interfere to enjoin the collection of a tax merely because the property has been assessed at a greater value than the court would have fixed upon it, but if the valuation is so grossly excessive as to furnish evidence of fraud on the part of the officer or body making the same, the court will interpose."

On page 609 the court says:

"Where, however, the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation—must reasonably have known that it was excessive—it is accepted as evidence of a fraud upon his part against the taxpayer and the court will interpose."

Here the collection of a fraudulently excessive tax was enjoined.

In the case at bar the officers departed entirely from their jurisdiction, assessed property of a non-resident

situate beyond the limits of the municipality, as being in transit to a place without the state, and therefore it follows as a conclusion of law that the entire assessment was void and a fraud upon the complainant.

In *Railway Co.* v. *Cole,* 75 Ill., 591, *supra,* the court held that whenever the Board of Assessors undertakes to go beyond its jurisdiction, it becomes the duty of courts to interfere and protect taxpayers against the consequences of such acts. Where jurisdiction is conceded, no mere difference of opinion as to the reasonableness of its valuations will justify equitable interference.

The learned author of Cooley on Taxation, page 761, says:

> "That there are certain cases with which the courts of law cannot adequately deal, cases of fraud, accident or mistake, and cases of cloud upon the title to one's property are also cases with which equity can most effectually deal, and it takes jurisdiction in tax cases, as it does in all others where any one of these grounds of jurisdiction appears. There are cases also in which equity on a single record might dispose of controversies which at law would require a multiplicity of suits; and this fact may furnish ample ground for equitable jurisdiction; for both the public and the parties concerned are interested in avoiding unnecessary litigation."

In support of the text the author cites, among other cases, *Cook County* v. *Railroad Co.,* 35 Il., 460.

In that case the complainant's rolling stock was assessed for taxation within the County of Cook. The bill averred that the company had no railroad within the limits of Cook County, nor did it operate any railroad to or within the limits of Cook County. The bill prayed a perpetual injunction that the tax might be de-

clared illegal and void, and for general relief. The court overruled the demurrer filed to the bill and decreed that the collection of the tax assessed should be perpetually enjoined.

Ogden City v. *Armstrong*, 168 U. S., 224:

This was a bill filed to enjoin the collection of a tax levied by the authorities of Ogden City upon the property of complainants. Mr. Justice Shiras delivered the opinion of the court. At page 233 it is said:

> "Upon the merits the first and most important question to consider is whether the city council had jurisdiction to assess and collect the paving tax."

It appears from the opinion, (page 240,) that the session laws of Utah provided that any party feeling aggrieved may pay the taxes levied under protest and bring his civil action at law to recover back the taxes so paid. Relative to this statute the court said:

> "As respects this contention, we agree with the Supreme Court of the Territory that this statute applies to cases where there are only errors, irregularities, over-valuations or other defects which are not jurisdictional, but that where the council not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities have no application."

So in the case at bar, if the assessor had no jurisdiction to assess the logs in controversy, his official action relative thereto would be wholly void for want of statutory power, and if, in pursuance of such void assessment the taxes should be assessed, the whole proceeding of the municipal officers could be enjoined.

Bank of Kentucky v. *Stone,* Sixth Circuit Court of Appeals, 88 Fed. Rep., 383, is an especially carefully considered case upon the proposition now under discussion. The personnel of the court was Mr. Justice Harlan, Taft and Lurton, the opinion by Judge Taft. The court recognized the general rule and held that:

> "It is well settled that in the Federal Courts an action at equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void and independently of every other consideration." (p. 390.) * * * "To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." (p. 391.)

Osborne v. *Bank,* 9 Wheaton, 738, is cited as authority for the conclusion of the court. In that case Chief Justice Marshall said:

> "The single act of levying the tax in the first instance is cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege."

High on Injunctions, Sec. 530, is also cited with approval. This section is as follows:

> "An important exception to the general doctrine of non-interference by injunction against the collection of the revenue because of illegality of the tax, is recognized in that class of cases where the relief is sought against a tax assessed upon property which has been exempted by law from taxation. Indeed, the exception has been so uniformly recognized as to become of itself a governing rule in the class of cases now under consideration. And it may be laid down as the established doctrine of the courts that

> the attempted enforcement of a tax upon property which has been exempted by proper legislative authority from the burdens of taxation, constitutes a grievance of so irreparable a nature as to merit preventative relief by injunction." Citing in support of the text a large number of decisions of the Supreme Court of the several states, including that of Michigan.

Applying these authorities and principles to the admitted facts in the present case, there would seem to be no possible doubt of the jurisdiction of equity to enjoin the collection of this tax. The property at the time the assessment was made and the tax levied, being beyond the corporate limits of the Village of Ontonagon, the law exempts such property from taxation by the municipal authorities. Also, as in *Osborne* v. *Bank, supra,* an action at law could not afford a remedy, except for the tax in controversy, and would not prevent a repetition of a similar annual assessment and levy. The defendants claim the legal right to levy this tax upon the property in transit without reference to its location, whether within or beyond the municipal limits. To deny the complainant relief in equity and require it to pay annually a void tax upon a void assessment, with no other remedy than an action at law to recover back the amount so unlawfully collected, would seem to be contrary to the principles of equity and chancery practice.

In *Smyth* v. *Ames,* 169 U. S., 515, it was contended that the plaintiffs had an adequate remedy at law and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. It was claimed that because the statutes of Nebraska expressly gave the plaintiffs a complete remedy in actions at law

that such statute took from the Circuit Court of the United States its equity jurisdiction. The court, however, held that a party

> "who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue in law in a state court, on the same cause of action." (p. 516.)

In *Hazard* v. *O'Bannon*, 36 Fed. Rep., 855, it is held that an injunction may be granted to restrain the collection of a tax imposed on property that is not subject to taxation, because it lies outside of the taxing district. In support of this proposition cases from the Supreme Court reports of Missouri are cited, but the court holds that

> "these decisions are in harmony with the general rule that prevails elsewhere, that the collection of a tax may be restrained if it is based upon an assessment that is clearly void."

In *High on Injunctions*, Section 502, the author says:

> "A distinction is drawn between cases of an irregular exercise of the taxing power or of an informal assessment and levy, and cases where there is an entire absence of any exercise of the power, and hence no valid assessment or levy. And in the latter class of cases, there being no exercise of the taxing power, what appears upon the tax records as a tax is illegal and void and its enforcement may be enjoined. So if there is a total want of authority to levy the tax, relief by injunction may properly be allowed."

The text is supported by the citation of a large number of cases in courts of undoubted authority.

It appears also that the rule of non-interference by equity is relaxed as to municipal corporations. We quote from Section 536 of High on Injunctions:

> "It will be found upon examination that courts of equity have been inclined in cases of assessments by municipal corporations to relax somewhat the stringency of the rule of non-interference as applied to the collection of state taxes, and relief by injunction has been more freely granted against the collection of municipal taxes than in cases affecting the collection of revenues by the state. And while it is difficult to perceive any sufficient reason for such distinction, the distinction itself remains. Thus, it is held that the general rule denying relief in equity against the collection of an illegal tax, in the absence of special circumstances bringing the case within some recognized head of equity jurisdiction, applies only to taxes levied by the sovereign, and not to taxes or assessments imposed by inferior bodies, such as municipal corporations."

Parmalee v. *Railroad Companies,* 3 Dillon, 25, was a bill in equity to restrain the collection of certain state, county and municipal taxes on account of an excessive and exorbitant valuation of the property alleged to have been illegally and improperly made by the State Board of Equalization, without jurisdiction. The personnel of the court was Mr. Justice Miller and Circuit Judges Dillon and Treat. Mr. Justice Miller in his opinion said:

> "It certainly cannot be denied that these various forms of municipal taxes by communities and cities and in townships are exercised by a class of men who are not very familiar with the laws under which they proceed; and to say the least of it, are not always observant of the rights of all parties interested in the taxation, and who do not always use the proceeds of that taxation either in the wisest manner or in the manner in which the law peremptorily declares they shall be used; and so for these reasons it would seem, looking at the general nature of the subject, that it ought to be within the power of some judicial body to arrest any unlawful proceeding in the levy

> and collection of taxes, and that no great harm would come in dealing with such bodies as they are, in subjecting them occasionally to the wholesome restraint of judicial proceedings when they are levying their taxes upon the people and disbursing them in ways which are not warranted by the law."

Under all the authorities, so far as we have been able to make a personal examination, it would seem that the facts of the case now presented to the court authorize the interposition of equity by injunction, and that the complainant has no other remedy equally efficient and adequate.

It is admitted by the parties that the tax was assessed upon complainant's property "as being in transit to some place without the state," and it is claimed that the Statute of 1899 is authority for this levy or assessment. There is no claim, or pretense, that the assessment could be made under any other statute, so that the controlling question is, whether the provision of the statute referred to is invalid as being repugnant to the Constitution of the United States.

The question is of very considerable importance to many business interests in Northern Michigan, where forest products are extensively transported to places without the state, either by navigation upon the rivers or streams, or by other methods of transportation, and it is within our knowledge that other cases involving the validity of this statute are now pending and held by the State Court until this court shall pass upon the validity of the statute.

In the court below, as here, appellant claimed that the state statute upon which the assessment necessarily

depended in whole, or in part, was in contravention of the Constitution of the United States, and hence the appeal direct to this court.

Respectfully submitted.

EDWIN WALKER,
Solicitor for Appellant.

Office Supreme Court U. S.
FILED
APR 25 1902
JAMES H. McKENNEY,
Clerk.

No. 96

Brf. of Chadbourne for Appellee

Filed Apr. 25, 1902.

Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

NO. 320

THE DIAMOND MATCH COMPANY,
Plaintiff,
vs.
THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE,
Appellee.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Brief and Argument for Appellee.

T. L. CHADBOURNE,
SOLICITOR FOR APPELLEE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 320.

THE DIAMOND MATCH COMPANY,
Appellants.

vs.

THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE, *Appellees.*

Appeal from the Circuit Court of the United States for the Western District of Michigan.

BRIEF AND ARGUMENT FOR APPELLEES.

REMARKS TOUCHING THE STATEMENT OF FACTS CONTAINED IN THE BRIEF FOR APPELLANT, SUBMITTED BY MR. EDWIN WALKER, SOLICITOR FOR APPELLANT.

The facts as they are there set forth are not controverted, except as follows:

1. About the middle of page 2 of that brief, it is stated that the logs cut by appellant were for appellant's use in the regular prosecution of its business and for sale "in open market." No part of the record supports, so far as I can see, that portion of the statement above quoted. Indeed the complain-

ant desribes itself as "engaged * * * in the manufacture and sale of matches" (Transcript pages 1 and 26).

2. Near the top of page 3 of that brief, it is stated that the pier jams and booms of appellant were beyond the municipal limits of both the village "and township" of Ontonagon. I find nothing in the record justifying that part of the above statement put in quotation marks.

These pier jams were, as appears by paragraph 5 of the stipulation, on page 9 of that brief, more than one mile above the mouth of the river and beyond the limits of the *Village* of Ontonagon. So also in paragraph 6 of the stipulation on the same page of the brief. So in paragraph 1 of the stipulation, near its end, on page 7 of that brief.

These pier jams were in fact within the limits of the Township of Ontonagon, though not within the limits of the Village of Ontonagon. So the bill of complaint alleges, thus, "they are driven down the tributaries of said Ontonagon river into the stream of said river, and thus down said Ontonagon river to a point at or near the mouth thereof in the *Township* of Ontonagon to the sorting grounds and pier jams of the complainant." (See transcript, page 2, at the close of paragraph 2 of the bill).

This allegation of the bill is admitted by the answer, as follows:

> "They admit that said logs were driven down said tributaries of said Ontonagon river and down said river and to the sorting ground and pier jams as alleged."

To make the situation of the logs, at the time of the assessment in question, clear, I will add that at that time the logs were in the Township of McMillan in Ontonagon county, which township was above the Township of Ontonagon on the course of the Ontonagon river.

See paragraph 7 of the stipulation, as quoted in that brief, on page 10 thereof.

3rd. At page 3 of that brief, at the end of the first paragraph on that page, the following statement is made: "Until about the first of May following there were practically no logs either *in transit* or in storage booms, etc." The above words, "*in transit*" are challenged, because they import a conclusion of law. Whether the logs were in transit in the sense of the Michigan statute providing for the taxation of property in that condition, and whether they were in course of export in the sense of the Federal constitution, are two questions in the case not to be prejudiced by anything purporting to be a recital of facts made in such manner as to conclude questions of law.

4. On the same page 3 of that brief, just above the words last above noticed, appears the following statement, namely, that the logs in question, in May, 1899, were within the Township of MacMillan, but not within the limits "or jurisdiction" of either the Village or Township of Ontonagon.

Now the question whether the logs were within the "jurisdiction" (for taxation) of the Township of Ontonagon was formerly, and whether within the jurisdiction of the Village is now, one of the ques-

tions of law in this case, and therefore it is not to be foreclosed by what purports to be a statement of facts. We allege and complainant denies, that the logs were in transit in the sense of the State statute at the time of the assessment, and we deny and appellant alleges, that if they were so in transit they were also in course of export in the sense of the Federal constitution; and we allege and appellant denies that the logs were within the jurisdiction (for taxation) of the Village of Ontonagon at the time of the assessment.

5th. Referring to the statement at the top of page 7 of the brief, to the effect that the last stipulation filed was intended to cover the preceding stipulations filed, and to embody all of the essential facts, we demur, and call the attention of the Court to all the stipulations upon the facts made between the parties, which are contained within pages 24 and 28 of the transcript.

6th. In addition to the stipulations of fact set forth on pages 7, 8, 9 and 10 of that brief, the following stipulations of fact should be added, which will be found set out on pages 25 and 26 of the transcript, namely:

> "1. Complainant shipped by rail from the Village of Ontonagon to its mills at Green Bay, Wisconsin, for sawing there, the following quantities of logs, at the following times, out of its logs in the Ontonagon river, described in the bill of complaint.
>
> Forty-two million feet in the season of 1897; thirty-seven million feet in the season of 1898, and fourteen million feet in the season of 1899

up to the date of the seizure of logs by the Village of Ontonagon for the satisfaction of the tax levied and assessed in and by said village in the year last named."

"2. Within the Village of Ontonagon, is, and has been, situated in and throughout the year 1899 the last boom or sorting gap in said river, from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid."

"3. During the season of 1899, beginning about June 1st, and up to the time of the seizure above mentioned, about ———— million feet of the ten (10) million feet of logs mentioned in the bill of complaint, were driven down the said river from the boom, pier jams or sorting grounds outside of said village, to the boom or sorting gap within said village, above described, and shipped thence by rail to complainant's said mills at Green Bay."

"4. About five hundred thousand feet of complainant's said logs in said river have been (in said river or slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid."

"5. The Village of Ontonagon is a duly incorporated village under the general laws of Michigan, to-wit: Act number 3 of the Laws of Michigan of the year 1895, entitled 'An Act to provide for the incorporation of villages within the State of Michigan, and defining their powers and duties,' and is situate on said river and in the Township of Ontonagon, one of the defendants herein."

"6. The water transit of said logs of complainant has heretofore always ceased since the burning of complainant's mills, described in the

bill of complaint, in said village, whence the same are shipped by rail as aforesaid."

"7. Said river and its tributaries are streams of water or rivers, all within the State of Michigan and within the County of Ontonagon (and as to some small part within the Counties of Gogebic and Houghton) in which County of Ontonagon said village is situated."

"8. Pursuant to and in accordance with the acts of the legislature of Michigan mentioned in the answer of said village in this suit, namely, Act number 319 of the Laws of 1893, and Act number 263 of the year 1895, and pursuant to and in accordance with a vote of the electors of the said village, duly held therein, and pursuant to, and in accordance with the action of its council, said village in the year 1894, borrowed the sum of thirty thousand dollars ($30,000), and issued and sold its bonds therefor, and in the year 1895 borrowed the further sum of twelve thousand dollars ($12,000) and issued its bonds therefor, and all of said bonds, being in principal and interest about forty thousand dollars ($40,000), were, at the date of filing the bill of complaint in this cause, outstanding, and said bonds outstanding constitute a valid charge against said village and against the taxable property thereof."

ARGUMENT ON BEHALF OF APPELLEES, THE VILLAGE OF ONTONAGON AND ITS TREASURER.

I

CONCESSIONS.

We have always conceded, and do now concede, appellant's contention, stated as paragraph IV on

page 13 of its brief, that under the facts of this case equity has jurisdiction to enjoin the collection of the tax, assuming that the tax is not warranted by the laws of Michigan. At the beginning of this litigation and until a time shortly before the decree was pronounced by the Circuit Judge, in addition to the parties defendant now appearing, the Townships of Ontonagon and MacMillan, both in the County of Ontonagon, were defendants in the proceedings. As all these municipalities claimed the right to tax the logs in question and had proceeded to do so, and as all of them could not have that right, and as the complainant had, under those circumstances, no adequate remedy at law to determine its rights and the rights of those three municipalities, the defendants now upon the record have never challenged the jurisdiction of chancery to interpose as prayed in the bill of complaint, and do not deny the propriety of the remedy by injunction on the case made by the bill. Nor do we see any reason to doubt the correctness of the position taken by the appellant on page 12 of that brief, numbered 1, that the Village of Ontonagon had no power to assess property for taxes levied thereon except that conferred by the general or special statutes of the State of Michigan.

II.

We take issue with the appellant on the positions taken by it and numbered II and III on pages 12 and 13 of that brief. First, as to the position numbered

II, we submit that the State of Michigan could, by legislative grant, authorize the Village of Ontonagon to impose a tax upon the property of non-residents, when the situs of such property was beyond its geographical limits. Whether property so situated is beyond its taxable "jurisdiction" is the question to be considered.

The assessment complained of was made under a statute which is quoted correctly, except as to a few verbal inaccuracies not important here, at pages 24 and 25 of that brief. This legislation is comprised in Act number 32 of the Public Acts of 1899 of the State of Michigan.

The purpose of this part of the Act is to provide for the assessment and taxation of a certain kind of personal property situated in a peculiar and exceptional manner described in the Act. It applies to residents and non-residents of the state alike, and to property destined to points within, as well as without the state. The property provided for is what is described in the act as "forest products." It is to be assessed where it "may be" on assessment day, except in cases where it is in transit to some place within the state, it shall be assessed not where it is in fact, but in the place to which it is in transit; and except that where it is in transit to some place without the state, it shall be assessed at that place in the state nearest to the last boom or sorting gap of the stream in * * * * this state in which the property will naturally be last floated during its transit.

Passing for the present the question whether this

part of this statute is in conflict with the constitution of the United States, a question considered in the next division of this brief, we submit that it is clearly competent for a state, where personal property is so situated that to define with precision its locus on the day of assessment is difficult, or is likely to lead to misunderstandings or conflict, to provide that it shall be assessed for taxation and taxed in a certain municipality, although as a matter of fact on that day it may not be locally present in that municipality.

The situation is this. Logs cut in the woods and hauled during the winter into the streams intended to transport them to or toward the place of manufacture, may be, and generally, or often, are, (in the State of Michigan, on the day of general assessment in April), *afloat* upon those streams and in motion, and actually and necessarily situated on that day in different municipalities through which the stream flows. Owing to the fact that the logs extend into different municipalities, and are or may be in motion, it would be difficult for these municipalities always, and in many cases would be impossible, to determine how much of a mass of logs was actually situated in each of such municipalities on that day. The attempt to make such determination would, in many cases, inevitably give rise to conflict, if not between the municipalities, yet certainly between the municipalities and the owners of the property, and would inevitably result in injustice to one or more of the municipalities, as well as in injustice to the owner of the property. To say that under such cir-

cumstances the state has not a right in its discretion to prescribe in which municipality of those through which they pass, the logs shall be taxed, is to say in substance that it has no right to protect itself against loss of revenue, nor the owner of the property against the injustice which is almost certain to befall him unless the state exercises this power. That the state should have the power to exercise the right is in fact less important to it than to the owner of the property.

These considerations are in no manner impaired by the fact that in this particular locality the winters are, usually, so severe that on the general assessment day in April the streams are closed by ice. Although this is true, it is also true that many of the streams in the state are at that time open, and the logs which have been cut and put upon them for transportation are in motion towards their destination. Whether, therefore, the embarrassment which would surround the assessment of logs if that assessment were to be made always in the municipality in which the logs were actually present on assessment day, in a given case exists, depends, first, upon the latitude of the stream within the state, and, second, upon the temperature prevailing in a given locality. The legislation in question is for the whole state, and the fact that it may be needless for a particular part of the state, or in a particular season, is, of course, of no consequence.

Appellant has quoted in his brief no case which deals with, or touches upon such a situation, and no case deciding that it is not competent to confer up-

on a municipality the right to tax personal property, which, owing to the above conditions, is not upon assessment day within its geographical limits, nor have we anywhere found any such case adverse to us.

Michigan is not the only state having legislation of this sort. There is similar legislation in at least the following states: *In Wisconsin* logs are to be assessed in the district where the mill where they are to be cut is situate, although the logs are elsewhere on assessment day and the owner does not reside there. Rev. Stat. of Wis. 1878, Sec. 1040. *So in Maine*, as appears by the case of Inhabitants of Farmingdale vs. Berlin Mills Co., 93 Me. 333, (cited from 45 Atl. Reporter 39). Such legislation is common, and no reason appears impeaching either its justice or conformity with the State Constitution.

In the absence of any cases known to us to the contrary, and in the absence of any argument in the appellant's brief, under paragraph 2, discussing the question under the state of facts here existing, we deem it unnecessary to argue this question at large.

It seems clear that the position here taken nowise conflicts with the principle, that property which is not protected by the municipality shall not be taxed by it. It appears from the record, first, that five hundred thousand feet of the logs in question were actually present in the Village of Ontonagon on assessment day (see page 18, paragraph "4" of appellant's brief), and that all of the property in question, on its course to its destination, would pass through and would remain a longer or shorter time

within the Village of Ontonagon. (See transcript, page 25, stipulations numbered 2, 3, 4, 5, 6 and 7). Surely the Village is not called upon to keep the property within its limits and there protect it for an entire year, or for any considerable time, in order to earn the privilege of taxing its owner on its account.

Of the cases cited by appellant in this part of its brief, *Wells* v. *Weston*, 23 Missouri, 384, and the Township of Flatbush case, 60 N. Y., 398, were cases concerning the taxation of land. The case of *Trigg* v. *Glasgow*, 2 Bush, 594, seems to have turned upon the construction of a statute, reading as follows: "All the taxable property *in* said town on the 10th of April shall be subject to taxation for the payment of said subscription," and providing that the taxable property *in* said town which may have been removed without its limits between the first of January, and the tenth of April for the purpose of evading the tax, shall be listed for taxation." The property which the Court decided was not subject to the tax seems never to have been in Glasgow; that is to say, it consisted of "choses in action, money and mercantile interests in Louisville." The Court decided that Section 16 of the Act as quoted in the report in connection with the language herein above quoted, limited the property subject to tax to "money and other substantive thing in bank or in the *actual* possession of its owner within the town limits," and that the property sought to be taxed was not such property, nor within the town of Glasgow. The report of the case is not very clear, but such seems to be its import.

City of St. Louis v. *Ferry Company*, 11 Wallace, 430, was merely a determination that under a given state of facts, in the case appearing, certain ferry boats were not in fact situated in the State of Missouri and were in fact situate in the State of Illinois, and were therefore not taxable in the former state. The corporation owning the boats was an Illinois corporation, and a resident of Illinois. The tax was laid upon the property and not upon the corporation, and the property was decided to be located as a matter of fact in Illinois, and not in Missouri, and for this reason not taxable in Missouri. On the face of the legislation, it could not be taxed unless it were "within the city," and it was not in fact within the city.

The case decides only that personal property belonging to a citizen of Illinois and situated in Illinois cannot be taxed in Missouri. It casts no doubt upon the proposition that the State of Missouri is competent to determine in which of its municipalities personal property situate in that state but belonging to a citizen of Illinois may be assessed and taxed.

It is said on page 19 of appellant's brief that:

> "It is a recognized axiom that the state itself has no right or power to impose taxes upon persons or property beyond the limits of the state; its sovereignty extends no further. The same principle limits the power of taxation of municipalities; it has (they have) no power to impose taxes upon persons or property beyond its (their) limits; its sovereignty extends no further."

"Sovereignty" cannot be attributed to a municipality. Its jurisdiction for taxation is what is lawfully conferred upon it by the sovereign state in which it lies; and no reason is perceived why the right to tax personal property which is to pass through it, and of which it is the mediate or final destination, may not, for reasons of convenience of which the state is the proper judge, be conferred upon it. In this case that right was so conferred.

This aspect of the statute has frequently been passed upon by the Supreme Court of Michigan, and no question of its validity under the State Constitution has so far as the cases show ever been raised.

Corning v. *Township of Masonville*, 74 Mich., 177. Here the owners of the logs resided in East Saginaw. The logs were held to be properly assessed in Masonville, Delta county, as being in transit and destined for the sorting or booming grounds situate there, although situate in fact on assessment day in Alger County.

Pardee v. *Township of Freesoil*, 74 Mich., 81. Here the owners were non-residents (of the state apparently). It was held that the logs were properly assessed in Ludington, to which place they were found to be in transit, and could not be assessed in Freesoil, where they were on assessment day.

Elk Rapids Iron Co. v. *Helena Township*, 117 Mich. 211. Here the property was held taxable in Elk Rapids, the place to which it was in transit, and not in other Townships (Milton and Helena), where it was on assessment day.

Assuming now that it is competent for the legislature of Michigan to fix a municipality on the course of the transit of such property for its assessment and taxation, although no part of it was, or all of it was not, on assessment day, in that municipality, I submit that the Village of Ontonagon was that place, and that this municipality rightfully assessed and taxed the appellant for this property.

It is stipulated (see transcript, page 25):

> "2. Within the Village of Ontonagon is and has been situated in and throughout the year 1899, the last boom or sorting gap in said river from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid."

"This fixes in the words of the statute, the Village of Ontonagon as the proper place for the assessmetn of these logs, if they were at that time, in the sense of the statute, "in transit to some place without the state." For in that case the statute provides that "it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in * * * * this state in which said property will naturally be last floated during the transit thereof."

strued legislation substantially identical in its

It is briefly suggested at the bottom of pages 30 and 31 and at the top of page 32 of appellant's brief, that the logs if assessable at all in Michigan, should have been assessed at the Village of Iron Mountain,

at or near which village the logs left the state and passed into the State of Wisconsin.

It is submitted that the statute clearly imports that the Village of Ontonagon was the proper place of assessment if the logs were in transit in the sense of the statute. In order that they should have been assessable at Iron Mountain, the transit of the property must be "other than through any water course in or bordering on the state"; that is to say, if no part of the transit is by water course, the assessment shall be made at the last point reached in Michigan before passing into another state. This seems to me to be so evidently true as to make enlargement upon it needless.

The comments in appellant's brief with respect to the case of *Elk Rapids Iron Company* v. *the Township of Helena*, 117 Mich., 211, make it important to lay before the Court more fully than is done in that brief, the Michigan statutes relating to this subject.

The legislation construed in that case is embraced in sub-division 8 of Sec. 14 and in Sec. 15 of Act No. 206 of the Public Acts of 1893. Said sub-division 8 reads as follows:

> "8. Personal property of non-residents of the state and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township on the second Monday of April of the year when the assessment is made, except that where

such property is in transit to some place within the state it shall be assessed in such place."

Said Sec. 15 reads as follows:

"Sec. 15. All forest products in transit on the second Monday in April in each year and thereafter found in the waters or streams of this state, or on the banks or shores of any lake, pond or stream of this state, when the same is not at the place where it is to be manufactured, shall be held to have a place of destination at the sorting grounds of the rafting and driving agents or booming Company nearest the mouth of the stream, unless the contrary shall be made to appear by the owner or party having the same in charge: *Provided* that all lumber, logs, timber, lath, pickets, shingles, posts, cordwood, tan bark, telegraph or telephone poles or railroad ties that may be piled or left in any yard, railroad reserve, or in any shed, shall not be deemed in transit, but shall be assessed to the person or corporation having control of the yard, railroad reserve, shed or place of storage where the same may be situated at the time provided by law for taking such assessment."

The legislation above quoted will be also found, unchanged, in the Compiled Laws of Michigan of 1897, 1st Volume, page 1193.

This legislation was so amended by Act number 32 of the Public Acts of 1899, that said Sections 8 and 15 were in effect consolidated into a Section numbered 8, which appears with substantial accuracy on pages 24 and 25 of appellant's brief.

The question in the Elk Rapids case is stated to be by the Court as follows: "The sole question is, were these products in transit at the time of the assessment."

Under the law considered in that case, logs if in transit to some place within the State of Michigan, were to be assessed "in such place"; and it was provided that all such property in transit on assessment day and thereafter found in the waters or streams of the State, or on the shores of any lake, pond or stream in the state when not at the place of manufacture, should be held to have a place of destination at the sorting grounds of the rafting or driving agents or booming company nearest the mouth of the stream, unless the contrary should be made to appear.

In the Elk Rapids case, therefore, the court construed legislation substantially identical in its import, as is believed, with that part of the legislation put in force by the Act of 1899, which is here in controversy; that is to say, the part of the Act construed by the Circuit Court below, and here to be construed, being the part which reads:

> "Except that where such property is in transit to some place without the state it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof."

I omit the clause following, providing for a different place of assessment where the property is to be transported other than by a water course, having said all that seems to me necessary to show that that question is not in this case. While it is true, therefore, that the Michigan Court has not con-

strued the whole of this statute as it now stands, it seems to be also true that it has established the meaning of that part of the present legislation which alone is material in this case.

It is submitted, therefore, that the Elk Rapids case governs this case, unless it can be distinguished upon its facts from this case.

As in the Elk Rapids case, the logs in question were destined to Elk Rapids, so in this case they were destined to Green Bay. There the logs were deposited in booms in the stream, as here. There as here large quantities of logs so destined were left over and not transported for a year. This language of the court is applicable here, *mutatis mutandis*.

"It is conceded that from the moment these logs were cut in the woods they were intended to be transported from there to complainant's mill at Elk Rapids for manufacture, and that the only delay contemplated was that caused by the condition of the water." In the case at bar, it would have to be added, it is true, that another cause for delay was the limited capacity of the mill in comparison with the number of logs in the stream, but that circumstance in nowise affects the fact that all the logs were intended to be transported, as soon as practicable under the circumstances, to the mill to be cut. They were also in the same situation, viz.: upon and in the stream which was (in part) to do the work of transportation.

The Elk Rapids decision seems to make the test of transit under the state statute threefold.

1st. That the property be not so situate as to

come under that part of the statute providing that "logs * * * * piled or left in any yard, railroad reserve or in any shed"; to which that part of the statute of 1899 providing for the assessment, in the place where it is, of "all forest products" (not in transit) situate in any premises, store, mill, dock, etc., corresponds.

2nd. That it shall be situate "in the waters or stream * * * * or on the banks or shores of any lake, pond or stream" not being the place of manufacture; to which that part of the statute of 1899 assuming that this class of property is in transit when it is in process of being "floated," and will be detained at a "boom or sorting gap" of a stream wholly or partly within the state, corresponds.

3rd. That it shall be destined for a place beyond where it lies, for manufacture, of which destination the intention of the owner is the best evidence; to which that part of the statute of 1899 providing that "where such property is in transit to some place (within or) without the state," corresponds.

It is submitted that the Elk Rapids case interprets the later as well as the earlier statute in so far as the former bears upon the facts of the case at bar.

The purpose of the later is the same as that of the earlier statute, viz: as above set forth, to prevent embarrassment to assessing officers, loss to the revenue, and litigation to the tax payer, certain to arise out of the conflicting claims of different municipal-

ities in which the property may be in part situated on assessment day.

It is further submitted that if the Elk Rapids case is not a conclusive adjudication, the language of the statute itself and its evident purpose, above dwelt upon, lead to the conclusion reached in that case as the correct conclusion.

That this was the purpose of the former and present legislation in question is further shown in the late case of *Mitchell* v. *Lake Township*, 85 N. W. Rep. 865 (Mich.), not at this writing otherwise reported. Here certain logs situate in several Townships intended for transport to the mill but "piled along a railroad" were held (under said earlier statute) to have been properly assessed in said several Townships; while other logs situate in two different Townships but stored in a lake or storage pond, were held to be taxable only in that one of the two Townships to which they were destined.

It is submitted, therefore, that under the Michigan statutes as interpreted by its highest court, logs are in transit when they are situate upon a body of water intended to act as a means of transport, and destined to some point upon the stream or water beyond where they lie. That such a situation, coupled with the intent of the owner to remove them by the same water where they are stored, to a further point thereon, constitutes the condition intended by the statute by the words "in transit."

Comment on the case in the Menominee Circuit, cited at pp. 32-34 of the other brief, seems uncalled for; both because the case is not authoritative, and

because there is no sufficient statement of facts to make the bearing of the opinion clear.

It may, however, be pointed out that the Court filing that opinion seems to have fallen into the same error believed to have been embraced by the appellant here; namely, that of assuming the status called in the statute "in transit" to be necessarily one with the condition set forth in the Errol case as required to bring property within the interstate commerce provisions of the Constitution of the United States.

There the Court put these two questions, answering the first in the affirmative and the last in the negative.

> "Are the products of a state although *intended for exportation to* another state, and *partially prepared for that purpose* by being deposited at a place or port of shipment within the state, liable to be taxed like other property within the state?"
>
> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?"

Property may therefore be "in transit" as these words are commonly used, and yet not in condition to be protected from state taxation, as exports.

It is not accurate to say, I submit, what is said on pages 37 and 38 of appellant's brief, that the "logs were not assessed in the usual way, for the reason that at the date of the assessment they were not within the corporate limits of the Village of On-

tonagon"; and it is a *non sequitur* to further say that they "therefore were assessed because of their 'anticipated' departure from the Township of McMillan to Green Bay, Wisconsin," etc.

They were assessed in the way all logs "in transit," whether destined to points within or without the state, were required to be assessed.

The reasons for providing that mode of assessment for property so situate are obvious, and have been already stated. The mode of assessment is not "therefore" because of their "anticipated departure" to a further point within or without the state, but because of the difficulties of assessment in the ordinary way. The taxation to which they are made subject is the same to which all property in the state is subjected, and it is levied upon the same day. The place where the tax is to be imposed is exceptional, only because of the peculiar situation of the property; and the place is exceptional with respect to all property "in transit," whether destined to a point within or without the state. It cannot therefore be reasonably maintained that the law is aimed at a class of property *because* it is intended for export.

Before leaving this part of the subject, the attention of the Court is called to the general and particular legislation conferring the taxing power on the Village of Ontonagon. This legislation is referred to in the transcript on pages 25 and 26 in stipulations numbered 5 and 8.

Act No. 3 of the Laws of 1895, is also contained in

Vol. 1 of the Compiled Laws of 1897, and contains the following provision on page 913.

> "(2852) Section 1. The Council shall have authority to raise by general tax upon the real and personal property liable to taxation in said Village (exclusive of taxes or highway and street purposes and not otherwise provided for in this Act) such sum not exceeding in any one year one and one-fourth of one per cent of the assessed value of such property, as they shall deem necessary for the purpose of defraying the general expenses and liabilities of the corporation and to carry into effect the powers in this act granted. The moneys so raised shall constitute a 'general fund.'"
>
> Hereupon follow other Sections permitting taxation for other purposes.

Act No. 319 of the Laws of 1893 (Local Acts), reads as follows:

> "AN ACT to allow the Village of Ontonagon, in the County of Ontonagon and State of Michigan, to borrow money and issue bonds in the sum of thirty thousand dollars to build water works and electric lighting plant.
>
> "Section 1. The People of the State of Michigan enact, That the Village Council of the Village of Ontonagon, from and after the passage of this act is hereby authorized and empowered to borrow on the faith and credit of said village a sum of money not exceeding thirty thousand dollars for a term not in excess of fifteen years from the date of issue, at a rate of interest not exceeding six per cent per annum, payable annually; and to execute the coupon bonds of said Village therefor in such form as the said Council may by a two-thirds vote of all the members elect determine; and to provide for the pay-

ment of the same, which bonds shall in no case be disposed of at less than their par value, and shall be paayble at such place or places as said Council shall direct.

"Sec. 2. All money borrowed under the provisions of this act shall be applied to the purchase or building of suitable water works and electric lighting plant for the use of said Village, under such rules and regulations as said council shall prescribe.

"Sec. 3. It shall be the duty of said council to provide, by tax upon taxable property or from any fund it may have and not otherwise appropriated, for the said sum of thirty thousand dollars and interest upon all bonds issued under the authority of this act. *Provided*, That no bonds shall be issued or money borrowed for such purposes until the question shall be submitted to the electors of the village at a special election called for that purpose by the council; and a majority of the electors voting at such election, voting therefor, shall decide.

"This act is ordered to take immediate effect.

"Approved March 24, 1893."

Act No. 283 (appearing erroneously in the transcript as No. 263) of the Laws of 1895 (Local Acts), reads as follows:

"An ACT to allow the Village of Ontonagon, in the County of Ontonagon and State of Michigan, to borrow money and issue bonds in the sum of twelve thousand dollars, to extend its system of water works and to complete its electric lighting plant.

"Section 1. The People of the State of Michigan enact, That the Village council of the Village of Ontonagon, from and after the passage of this act, is hereby authorized and empower-

ed to borrow, on the faith and credit of said village, a sum of money not exceeding. twelve thousand dollars for a term not in excess of twenty years from the date of issue, at a rate of interest not exceeding six per cent per annum, payable annually; and to execute the coupon bonds of said village therefor in such form as the said council may, by a two-thirds vote of all the members elect, determine; and to provide for the payment of the same, which bonds shall in no case be disposed of at less than their par value, and shall be payable at such place or places as said council shall direct.

"Sec. 2. All money borrowed under the provisions of this Act shall be applied to the extension of the system of water works and the completion of the electric lighting plant for the use of said village, under such rules and regulations as said council shall prescribe.

"Sec. 3. It shall be the duty of said council to provide by tax upon the taxable property or from any fund it may have and not otherwise appropriated, for the said sum of twelve thousand dollars and interest upon all bonds issued under the authority of this act: *Provided*, That no bonds shall be issued or money borrowed for such purposes until the question shall be submitted by the council to the electors of the village at any regular annual election, or at a special election called for that purpose; and a two-thirds majority of the electors voting at such election, voting therefor, shall decide.

"This act is ordered to take immediate effect.

"Approved February 13, 1895."

III.

It does not follow that because, in the sense of the laws of Michigan, the logs were "in transit" to a place without the state that they were in course of export in the Federal sense.

It may be safely said that this Court will hesitate before making a decision which would exempt from state taxation altogether all timber cut in Michigan and placed in its streams for partial or total transport with a destination outside of the state. Its timber product is very large and that part of it destined for export is only less large. In this the litigants in this case agree.

> "The streams of Northern Michigan are extensively used for the transportation of forest products to points within and points without the state." * * * (Appellant's brief, p. 34.)

Here may also be properly noticed certain strained and unwarranted assumptions in the brief touching this subject; on page 36, it is said:

> "It is admitted in this case, *as a fact*, that complainant's logs were *actually started* in the course of transportation to Green Bay, at a point on the Ontonagon river beyond the municipal limits of the Village of Ontonagon, and were floated down to the yards, and there delivered to the Railroad Company for the balance of the transportation. It is further admitted that these logs were as a *matter of fact* in transit * * ".

"In the Errol case, the essential question was whether the property was actually in transit or not, while in the case at bar it is *admitted that the property was in transit.*"

At page 37:

"In the present case the logs had *started* on their ultimate passage in the course of transportation, before this assessment was made * * * * *."

At page 38:

"By stipulation of the parties this essential *fact* (viz: that the property was in transit) is admitted * * *."

The italics in the above extracts are mine. It may be confidently asserted that the record contains nothing to warrant these statements, and other similar statements, contained in the brief. Indeed the record expressly negatives them, or negatives the implication they seem intended to convey; thus,

"6. That at the close of the season of 1898 the logs in *controversy* were *held by said complainant and detained* and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant, the Village of Ontonagon, *waiting the delivery for transportation*, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been so *held and detained by* the complainant in the regular course of its business," etc. (Again the italics are mine). See also in the same stipulation "7" next following. (Transcript pp. 27, 28.)

So stands the record on the stipulated facts. The defendant's answer, in so far as it contains allegations upon the subject, shows plainly that the words "in transit" are used in the sense of the Michigan statute, and not otherwise, thus:

> "Fifth. Touching the matters relating to the question whether said property is subject to taxation in the said Village of Ontonagon, these defendants say that they are advised and believe, and thereupon allege the fact to be, that all of the property mentioned in said bill of complainant, whether the same be more or less than is alleged in said bill, namely, all the logs in the Ontonagon river and its tributaries belonging to the complainant intended to be removed down said stream to and into the Village of Ontonagon, thence to be shipped by rail as in said bill alleged, are, under and by virtue of the laws of Michigan, taxable in said Village of Ontonagon as well as in said Township of Ontonagon, said village last named being in said township last named. And they further aver that all of said property so situated, be the same more or less in quantity, are forest products and are in transit to a place without the State of Michigan, namely, in said Green Bay.
>
> "That the water transit of said property has heretofore ceased, and will continue to cease, in the Village of Ontonagon and in said Township of Ontonagon, whence the same is and is to be shipped by rail as aforesaid. The said Ontonagon river and its tributaries are streams of water or rivers all within the State of Michigan and within the County of Ontonagon, in which said Village of Ontonagon is situate."
>
> (Transcript pp. 12, 13.)
>
> "These defendants further aver the fact to be

that all of the logs of said complainant in said river or stream and its tributaries were at the time of the assessment of 1899 made by the authorities of said Village and Township of Ontonagon, in transit within the meaning of the laws of Michigan touching the taxation of logs and forest products in transit."

"These defendants further aver that for ten years, or thereabouts, previous to the destruction by fire of complainant's mills at Ontonagon, said township of Ontonagon assessed for taxation year by year, all of said complainant's logs in said river and its tributaries, whether situate at the time of assessment in said Ontonagon township, or in other townships in said County of Ontonagon, or in the County of Gogebic, through part of which latter county part of said river and its tributaries run, as in transit to said mills in Ontonagon, and that said complainant acquiesced in such assessment, and for said years paid the taxes levied thereon year by year without protest, and that for two years after the destruction by fire of said mills, said Township of Ontonagon in like manner assessed all of said logs so afloat as in transit, and that said complainant acquiesced in like manner in said assessment, and paid without protest (except as to 1898 a general protest, and not on the ground that said logs were not in transit) the taxes levied in said assessments in said above named two years year by year. And defendants further aver that during all of said years, before and after the destruction of their said mills, said complainant treated said logs as in transit to their said mills in Ontonagon and Green Bay respectively." (Transcript pp. 15, 16.)

It thus clearly appears that no part of the record justifies the assumption that admission has been

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anywhere made that the property in question when taxed was in actual process of export, as numerous parts of appellant's brief seem to declare or intimate. Whether it was or was not "in transit" so as to be subject to the Michigan statute fixing a place for the assessment of property in that state or condition, was the leading question of the litigation below, affirmed on the one side and denied on the other, both in pleadings and argument.

IV.

The case of *Coe* v. *Town of Errol* seems to cover the case at bar and rule it in favor of the defendant, so far as concerns the alleged conflict between the Statute of Michigan and the Constitution of the United States. In both cases the logs are placed in a water course to be thence floated down (and thence in the case at bar carried by rail) to a point without the state. It was there agreed, as it is here agreed, that for many years the complaining party had cut large quantities of timber in the state and floated (and carried by rail) them to their mills in another state. It was there and is here contended that under such circumstances the logs were exempt from state taxation in consequence of the Constitution of the United States. The question was there, as it is here,

> "Are the products of a state, although intended for exportation to another state and partially prepared for that purpose by being

deposited at a place or port of shipment within the state, liable to be taxed like other property within the state?"

"Does the owner's state of mind in relation to the goods, that is, his intent to export them and his partial preparation to do so, exempt them from taxation?"

The following quotations from the opinion seem to fit the case at bar with precision.

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state subject to its jurisdiction and liable to taxation there if not taxed by reason of their being intended for exportation but taxed without any discrimination in the usual way and manner in which such property is taxed in the state."

Here the property was taxed in the usual way and manner in which such property is taxed in Michigan.

Here it is agreed that the property, on the day of assessment, was frozen up in the Ontonagon river where it had been deposited, behind a boom. That it did not begin to move down the river until about a month after the assessment, and was not put up-

on the cars for transportation at the mouth of the river for a like time. (Transcript, pp. 27, 28. Stipulations numbered 5 and 6.)

> "Although intended for exportation, they may never be exported. The owner has a perfect right to change his mind, and until actually put in motion for some place out of the state or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state?"
>
> "That such goods do not cease to be part of the general mass of property in the state subject as such to its jurisdiction and to taxation in the usual way until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject."
>
> "But this movement does not begin until the articles have been shipped or started for transportation from one state or another. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of the journey."
>
> "Until shipped or started on its final journey out of the state, its exportation is a matter altogether *in fieri* and not at all a fixed and certain thing."

I see no way to add anything which would be as cogent as these quotations from the opinion of the Court, bearing upon the present case, and respectfully submit that the decree of the Circuit Court should be affirmed.

T. L. CHADBOURNE,
Solicitor for Appellees.

Supreme Court of the United States.

No. 96.—October Term, 1902.

The Diamond Match Company, Appellant, vs. The Village of Ontonagon and George Ducleau, Treasurer of said Village.	Appeal from the Circuit Court of the United States for the Western District of Michigan.

[January 19, 1903.]

This is a bill in equity to restrain the collection of certain taxes levied under the following law of the State of Michigan:

"Personal property of non-residents of the State, and all forest products owned by residents or non-residents or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within the State it shall be assessed in such place, except that where such property is in transit to some place without the State it shall be assessed at the place in this State nearest to the last boom or sorting gap of the stream in or bordering on this State in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any watercourse in or bordering on this State, then such assessment shall be made at the point where such property will naturally leave the State in the ordinary course of its transit, and such property so in transit to any place without the State shall be assessed to the owner or person, persons or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons or corporation operating upon any such stream, then such property may be assessed to such person, persons or corporation, and the person, persons or corporation so assessed for any such property belonging to a non-resident of this State shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment or for money had and received, any amount which the person, persons or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied: *Provided, further*, That any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200,) with two sufficient securities, conditioned for the payment of such tax by such owner or person interested, and the

saving of the person, persons or corporation assessed from payment thereof, and from costs, damages and expense on account of his non-payment, which bond, as to amount and sufficiency of surety, shall be approved by the county clerk of the county in which the assessment is made."

It was contended that the taxes assessed were illegal and void, "because said taxes were assessed in violation of and repugnant to the general provisions of the Constitution of the United States; and especially because said taxes were assessed in violation of, and said statutes of the State of Michigan are in violation of and repugnant to, those parts of section 8 of article I of the Constitution of the United States, which provide that: 'The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States,' and section 10 of said article, which provides that: 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

By stipulation the bill was dismissed as to the township of Ontonagon and the township of McMillan. As to the other defendants the bill was submitted on an agreed statement of facts and the pleadings. The court sustained the assessment and dismissed the bill. This appeal was then taken under section 5 of the judiciary act of 1891.

The following is the stipulation of facts:

"It is hereby further stipulated by and between the complainant and the defendants Village of Ontonagon, and George Ducleau, its treasurer, that the following statements of fact are true, and may be used in evidence on the hearing of said cause by either of the parties to this stipulation, subject to objections for immateriality, to wit:

"1. The complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, in said State; that it is engaged, and has been from the date of its organization, in the manufacture and sale of matches, and that in the prosecution of its business it purchased and became the owner of a large amount of pine wood, timber, &c., situate on the Ontonagon River and its tributaries in Ontonagon County and other counties in the State of Michigan, and that for many years prior to 1896 it owned and operated extensive saw mills and plant near the mouth of the Ontonagon River, and within the corporate limits of the defendant Village of Ontonagon; that, in its usual course of business, it cut or purchased a sufficient quantity of timber to supply its mills during the following season, not exceeding forty million of feet, board measure, and placed the same during the winter upon and in said Ontonagon River and its tributaries, there to remain until the breaking up of the ice in said river in spring time, when they were and are driven down the river to the pier jams, booms and sorting grounds of the complainant, located above said mills, and outside of the limits of defendant, The Village of Ontonagon.

"2. That in the summer of the year 1894 extensive forest fires swept over said pine lands of the complainant, and other pine lands, situate on said Ontonagon River, doing great damage to the timber thereon; that in order to preserve the timber so injured by said fire, it became and was

necessary to cut all of said timber and put the same into the waters of the above-named stream for preservation; that during the winter of 1894 and 1895 said complainant, in order to preserve said timber, was compelled to cut and did cut about one hundred and eighty million feet of logs, and for the sole purpose of preservation placed the same in said river and its tributaries, there to remain until the complainant could float said logs down said river and streams to its mills to be manufactured into lumber; that it was not the intention or purpose of the complainant after the opening of navigation and during the season of 1896 to remove all said logs, but only such amount as could be manufactured at its said mills during the season, and that the capacity of said mills did not exceed about the amount of forty million feet per annum, as hereinbefore stipulated.

"3. That the navigation of said river and stream is closed by reason of the formation of ice about the first of December of each year, and is not open until after the first of May, following in each year.

"4. That in the month of August, A. D. 1896, the complainant's said mills were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul Railway, from Ontonagon to its saw mills located at Green Bay, in the State of Wisconsin. That in the regular prosecution of its business of manufacturing said logs into lumber said complainant has not during any season since 1896 transported a larger quantity of said logs than it could manufacture into lumber at its mills at Green Bay, said quantity being on an average of less than forty million feet of logs, board measure.

"5. That for the purpose of preserving said logs and preventing the same from floating down said river and into Lake Superior said complainant was compelled to and has utilized certain jam piers, booms and appurtenances, constructed by the plaintiff across said river, more than one mile above the mouth thereof, and beyond the limits of said village of Ontonagon; that by reason of said appliances said logs have been held in said river and upon the banks thereof above said jam piers, booms, &c., said complainant only passing through said piers such quantities as it could transport and manufacture into lumber at its said mills from time to time during each successive season since the year 1896; that during each successive season it has been the usual and necessary practice of the complainant to pass through said piers, booms, &c., such quantities of logs as said railway company could furnish facilities for transportation, thence down the river to the place of delivery as described in paragraph 2 of another stipulation of facts made herein to said railway company, to be loaded upon cars for transportation, and that said place of delivery was near the mouth of said river and within the corporate limits of said defendant The Village of Ontonagon; that all of said logs so delivered to said railway company are transported over its lines to Green Bay, Wisconsin, leaving the State of Michigan at a point near the village of Iron Mountain in said State.

"6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, &c., in said Ontonagon River, above and beyond the limits of said defendant, The Village of Ontonagon, waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been

so held and detained by the complainant in its regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed, as charged in said bill of complaint, were not at the time said assessment was made, and on the second Monday of April, A. D. 1899, were not, except as stated in paragraph 4 of another stipulation, made herein, and never had been within the corporate limits of the said defendant, The Village of Ontonagon.

"7. That the logs in controversy at the time said assessment was made by said defendant, The Village of Ontonagon, were and had been for more than one year prior thereto, in the manner above described, held and detained by the complainant within the municipal limits of the township of McMillan in said county of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899, by the proper officers of said township of McMillan, claiming the right so to do under the general statutes and laws of the State of Michigan.

"It is further stipulated and admitted by the parties to this stipulation that the assessment of the complainant's logs in controversy was not valid unless it shall be held as a question of law that the defendant, The Village of Ontonagon, had the legal right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit under the statutes of the State of Michigan in such case made and provided."

The other stipulation of facts referred to is as follows:

"1. Complainant shipped by rail from the village of Ontonagon to its mills at Green Bay, Wisconsin, for sawing there, the following quantities of logs, at the following times out of its logs in the Ontonagon River, described in the bill of complaint:

"Forty-two million feet in the season of 1897; thirty-seven million feet in the season of 1898, and fourteen million feet in the season of 1899 up to the date of the seizure of logs by the village of Ontonagon for the satisfaction of the tax levied and assessed in and by said village in the year last named.

"2. Within the village of Ontonagon, is, and has been, situated in and throughout the year 1899 the last boom or sorting gap in said river, from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid.

"3. During the season of 1899, beginning about June 1, and up to the time of the seizure above mentioned, about — million feet of the ten (10) million feet of logs mentioned in the bill of complaint, were driven down the said river from the boom, pier jam or sorting grounds outside of said village, to the boom or sorting gap within said village, above described, and shipped thence by rail to complainant's said mills at Green Bay.

"4. About five hundred thousand feet of complainant's said logs in said river have been (in said river of slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid.

"5. The village of Ontonagon is a duly incorporated village under the general law of Michigan, to wit: act number 3 of the Laws of Michigan

of the Year 1895, entitled 'An act to provide for the incorporation of villages within the State of Michigan, and defining their powers and duties,' and is situate on said river and in The Township of Ontonagon, one of the defendants herein.

"6. The water transit of said logs of complainant has heretofore always ceased since the burning of complainant's mills, described in the bill of complaint, in said village, whence the same are shipped by rail as aforesaid.

"7. Said river and its tributaries are streams of water or rivers, all within the State of Michigan and within the county of Ontonagon (and as to some small part within the counties of Gogebic and Houghton) in which county of Ontonagon said village is situated.

"8. Pursuant to and in accordance with the acts of the legislature of Michigan mentioned in the answer of said village in this suit, namely, act number 319 of the Laws of 1893, and act number 263 of the year 1895, and pursuant to and in accordance with a vote of the electors of the said village, duly held therein, and pursuant to, and in accordance with the action of its council, said village, in the year 1894, borrowed the sum of thirty thousand dollars ($30,000,) and issued and sold its bonds therefor, and in the year 1895 borrowed the further sum of twelve thousand dollars ($12,000) and issued its bonds therefor, and all of said bonds, being in principal and interest about forty thousand dollars ($40,000,) were, at the date of filing the bill of complaint in this cause, outstanding, and said bonds outstanding constitute a valid charge against said village and against the taxable property thereof."

Mr. Justice McKENNA delivered the opinion of the Court.

The contention of appellant is presented in three propositions. (1) That the village of Ontonagon had no power to assess the property under its charter. (2) That the legislature could not confer such power. (3) That the property was in the course of transportation within the meaning of the commerce clause of the Constitution of the United States.

1. This proposition is unimportant. If the charter did not, the statute of 1899 did, authorize the assessment.

2. To sustain this proposition would embarrass the power of the State —indeed, make it impotent to deal with the conditions there existing. The statute, no doubt, was enacted as a means to subject property to taxation which had no definite or enduring locality, and because of the clash or confusion of jurisdictions. In such circumstances experience, probably, demonstrated that property escaped taxation or was difficult to tax, or that controversies arose. It was competent for the legislature to defeat either result by giving moving property a definite situs as of some day. Nor is that power impugned by the principle that protection is the consideration of taxation. There is protection during the transit through the municipalities of the State and at its termination in the State—protection accommodated to the kind of property and as efficient as links are to the continuity of a chain.

There is nothing in the cases cited by appellant which sustains the opposite view. *Trigg* v. *Glasgow*, (2 Bush, 594,) seems to have turned upon the interpretation of a State statute. Under a statute of the State the town of Glasgow was authorized to subscribe to the stock of a railroad, and by the charter of the town it was the duty of the trustees to "levy an ad valorem tax on the property, both real and personal, within said town, that is listed for State purposes, including the amount given in under the equalization laws, sufficient," &c.

By an amendatory act it was provided that "all the taxable property in said town on the 10th of April shall be subject to taxation for the payment of said subscription;" and it also provided that the taxable property *in* said town which may have been removed without its limits between the 1st of January and the 10th of April, for the purpose of evading the tax, should be listed for taxation.

The court held, as we understand its opinion, that property to be subject to taxation under the statute must be *in* the town. If it had been taken out to avoid taxation, it was subject to taxation when brought back.

St. Louis v. *The Ferry Co.*, (11 Wall. 423,) was also an interpretation of the State statute. The city of St. Louis had power to tax all property *within the city.* It was held under the circumstances of the case that the ferryboats of the ferry company had their situs in the State of Illinois. It was said:

"Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was, in the eye of the law, a citizen of that State, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property."

In *Wells* v. *Weston*, (22 Mo. 384,) and *In Assessment of Lands in the Town of Flatbush, &c.*, (60 N. Y. 398,) the property taxed was real estate.

The purpose of the statute of Michigan is to assess the forest products of the State—things which are a part of the general property of the State. Those "in transit" are assessable according to their destination. If that be "some place within the State," the property is to be "assessed in such place;" if that be "some place without the State," the property is to be assessed at the place in the State "nearest to the last boom or sorting gap of the same in or bordering on the State in which said property will naturally be the last floated during the transit thereof."

But it is also provided that "*in case the transit of any such property is to be other than through any watercourse in or bordering on this State,*

then such assessment shall be made at the point where such property will naturally leave the State in the ordinary course of its transit."

We may assume for the present that the property was in transit and to some place without the State. Was the "transit to be other than through any watercourse in or bordering on" the State? The appellant contends that it was because it was to be by water and by rail; in other words, the transit was not to be exclusively "through any watercourse." But to give that meaning to the statute words must be added to it. It must be made to read other than *exclusively* or *wholly* or *entirely* "through any watercourse." One of these words must be added to make the sense contended for. The word "other" is used to express a difference—the difference being between a transit which is and one which is not through *any* (the word is significant) watercourse.

The transit in controversy was to be through (by means of) the Ontonagon River, certainly a watercourse, and by the Chicago, Milwaukee and St. Paul Railway, and, therefore, the property was properly assessed by the village of Ontonagon, that being the place in the State nearest to the last boom or sorting gap of the stream in or bordering on the State in which said property naturally would be and was intended to be last floated during the transit thereof.

3. Was the transit interstate commerce? We agree with counsel that it is unimportant in determining an answer whether the transit "was by water or by railroad, or both water and railroad." But no purpose to burden interstate commerce is evident in the statute, and the power of the State to tax everything which is part of what has been called "the general property" or "the general mass of property" of the State, is undoubted. But things which have been brought to a State may not have reached that condition. Things intended to be sent out of a State, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out—may be confused by circumstances, and the confident assignment of the property as subject or not subject to taxation is not easily made. Fortunately we are not without illustrations in prior cases, and in *Kelley* v. *Rhoads*, decided concurrently with this, we express the principles of decision.

In *Brown* v. *Houston*, (114 U. S. 622,) the property (coal in barges) had reached the State, but was yet in the boats in which it had been brought into the State. While on the barges it was offered for sale. It was held it had become part of the property of the State and was subject to taxation. *Pittsburg &c. Coal Co.* v. *Bates*, (156 U. S. 577,) had facts assimilating it to the case at bar, and it was affirmed on the authority of *Brown* v. *Houston*. As in the latter case, the tax was on coal in barges shipped from the mines in Pennsylvania, and consigned to New Orleans, Louisiana. The coal, however, had not reached, as the coal in *Brown* v.

Houston, its exact destination. To accommodate the exigencies of the owner's business, the barges, "about one hundred in number, were stopped and moored in the Mississippi River, at a convenient mooring place about nine miles above the port of Baton Rouge." The coal was held subject to taxation.

In *Coe* v. *Errol*, (116 U. S. 517,) logs which had been cut in the State of Maine, and others which had been cut in the State of New Hampshire, were floated in course of transit down a stream in New Hampshire to the town of Errol, in the latter State; thence to be floated down the Androscoggin River to the State of Maine. The town of Errol assessed upon the property a county, town, school and highway tax. The tax was sustained by the Supreme Court of the State of New Hampshire as to the logs cut in that State, and abated as to those cut in Maine. The judgment was affirmed by this court.

Mr. Justice Bradley, delivering the opinion of the court, expressed the contentions of the parties in two questions:

"Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

"Do the owners' state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution."

It is obvious that like questions could be framed upon the facts of the case at bar to express the propositions presented. Mr. Justice Bradley's observations, therefore, become pertinent and decisive. He discussed every consideration. He clearly exhibited the extent of the power of the State over the property within it, whether in motion or at rest, though destined for points out of it. He said:

"There must be a point of time when they (goods destined to other States) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that the moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or on a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the State."

And further:

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said however in relation to the products of a State intended for transportation to another State will indicate the view which seems to us the sound one on the subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are of the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. It is true, it was said in the case, *The Daniel Ball*, (10 Wall. 557, 565): 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey."

These cases are referred to in *Kelley* v. *Rhoads, supra*, as defining the taxing power of a State. And their substance is declared to be "that while property is at rest for an indefinite time or awaiting transportation, or awaiting sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce, and is exempt from local assessment."

In further specialization of these propositions we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another State. In the one case, though it have not reached its place of disembarkation or delivery, it may be taxed. (114 U. S. 662.) In the other case, until it be shipped or started on its final journey, it may be taxed. (116 U. S. 617.)

The case at bar falls within this principle. It is alleged in the bill that during the winters of 1895 and 1896 the plaintiff cut, hauled and put into the Ontonagon River and its tributaries, one hundred and eighty million feet of logs for the purpose of saving, protecting and preserving the same; that said lumber was more than plaintiff could utilize in any

one season at its mills, and it was not, therefore, the intention at the opening of the streams to make a clean drive of the same, but only to take down the streams the following spring and summer, and each succeeding driving season, the number complainant could utilize; that complainant was at the time the logs were cut and put in the streams an owner of lumber mills situated at or near the corporate limits of the village of Ontonagon; that said mills were destroyed by fire in the fall of 1896, and were not rebuilt, and that after the destruction thereof plaintiff destined the logs for its mills at Green Bay, Wisconsin, but that it was not its intention to take to said mills during any one summer any more than sufficient for its purposes, and not to exceed generally twenty million feet —according to the stipulation forty million feet. The route of the logs from the forests to the mills is described as follows:

"They are driven down the tributaries of said Ontonagon River into the stream of said river and thence down said Ontonagon River to a point at or near the mouth thereof, in the township of Ontonagon, to the sorting grounds and pier jams of the complainant; they are then loaded aboard cars and shipped by rail to Green Bay, Wisconsin, via the Chicago, Milwaukee & St. Paul Railway, and pass out of the State of Michigan at a point near the village of Iron Mountain in said State."

The number of the logs shipped by rail from Ontonagon to Green Bay before the levy of the tax complained of is given in the stipulation of facts, and it is stipulated that "about five hundred thousand feet of complainant's said logs in said river have been (in said river of slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid."

The appellant's contention is that the movement of the logs commenced at the opening of navigation of the river (presumably in the spring or summer of 1896 and 1897,) and from that date were in continuous transit as subjects of interstate commerce, and exempt from taxation. The contention is more extreme than that made and rejected in *Coe* v. *Errol.*

Decree affirmed

True copy.

Test:

Clerk Supreme Court, U. S.